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ABSTRACT

Universities and colleges in this country, with few exceptions, have been established as either private or public corporations authorized by state governments. This document presents a review of the history of the corporate form in American higher education, intended as a contribution to understanding the nature of its government as a background for an exploration of alternative bases for its relationship with government. To chronicle this history, the essay divided into two parts. Part I examines the medieval origins and English practices that influenced the formation of the colleges in colonial America. Part II reviews the governing arrangements for these early colleges, the evolution of the corporate idea during the 18th century, the influence of Lockean philosophy, the background of the Dartmouth College Case and its decision, and the ensuing distinction between public and private colleges and universities. A concluding section very briefly surveys the implications of the Dartmouth College decision and the modifications to it by subsequent court cases, the total impact of which was to establish the parameters for the corporate models as basis for American college and university government. (Author)

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THE CORPORATE BASIS OF UNIVERSITY AND COLLEGE GOVERNMENT:

AN HISTORICAL ANALYSIS

E. D. Duryea, Professor
Department of Higher Education

HE 004729

FACULTY OF EDUCATIONAL STUDIES
State University of New York at Buffalo

OCTOBER 1973

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UNIVERSITY AUTONOMY AND ITS CORPORATE ORIGINS:
An Historical Analysis of the Corporate Form As the Basis for University and College Government

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FACULTY OF EDUCATIONAL STUDIES
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PREFACE

Universities and colleges in this country, with few exceptions, have been established as either private or public corporations authorized by state governments. This authorization has been by means of a charter for private institutions and a legislative statute or constitutional section for public ones. It has conveyed a grant of governing authority to a board of control consisting of non-academic members which thereby received legitimization for legal status as a private or public corporation. While in practice during the last two centuries boards have delegated an increasing amount of actual control over educational and managerial affairs to faculties and to the president and administrative officers, they have remained the legally responsible body.

Historically this corporate condition has supported two important characteristics of American higher education. On the one hand, the boards have served as representatives of the public interest in their supervision of institutional affairs. On the other they have functioned as autonomous entities, a bulwark against the more direct intrusions of external political, economic, and at times religious, pressures. The resulting dualism -- what might be termed a balance, even though at times uneasy, between responsibility and independence or, in contemporary terms, accountability and autonomy -- has supported in general the societal vitality of the academic enterprise.

However, in the late twentieth century the corporate integrity associated with governing boards shows evidence of deterioration. For one thing, corporations in general feel the impact of state and federal regulation augmented in recent decades under a broadened concept of the public interest. For another the tremendous expansion of higher education has begun to reinforce for its institutions much more firmly their status as quasi-public utilities and has resulted in new dimensions of governmental overseeing and supervision. For public colleges and universities one finds intrusions by state budget and accounting offices and civil service commissions and the accretion of central coordinating and control boards. For private higher education, the essentiality of improved financial resources has meant a turn to public support with its inevitable subordination to state supervision. Fundamentally, it appears clear enough that the universality of higher education works against its autonomy so long ensconced in the corporate status of governing boards.

Evidence such as the above implies the likelihood if not the inevitability of fundamental changes in the governing relationship between institutions and state governments. It leads one to speculate regarding alternative modes for handling this relationship if institutions of higher learning are to retain their autonomy. Such autonomy, long bolstered by corporate boards, in the view of this author constitutes an essential foundation for institutions of higher education if they are to remain a significant force for the advancement of knowledge and promotion of the societal welfare.

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What follows here is a review of the history of the corporate form in American higher education, intended as a contribution to understanding the nature of its government as a background for an exploration of alternative bases for its relationship with government.

The contemporary concept of a corporation originated in the medieval era, matured in Tudor England, and upon transplanting to colonial America flourished in a form distinctive to this nation. Traditionally, it has proffered an effective mechanism whereby governments could maintain their sovereignty yet delegate in an orderly way authority for activities deemed important for the public interest. It also contributed to the decentralization of the power of government in a manner which enabled private forces to counter the supremacy of the state. For colleges and universities it made possible the formation of an expanded system for education outside the bureaucracy of a governmental department.

To chronicle this history, the essay which follows divides into two parts, as follows:

Part one examines the medieval origins and English practices which influenced the formation of the colleges in colonial America.

Part two reviews the governing arrangements for these early colleges, the evolution of the corporate idea during the eighteenth century, the influence of Lockean philosophy, the background and arguments of the Dartmouth College Case and its decision, and the ensuing distinction between public and private colleges and universities.

A concluding section very briefly surveys the implications of the Dartmouth College decision and the modifications to it by subsequent court cases, the total impact of which was to establish the parameters for the corporate model as the basis for American college and university government.

What remains to be done, however, probably holds greater importance. The next stage for the analysis which this essay initiates will take up the historical chronicle at the turn of the last century. It will examine first the status of governing boards and their relationships with government at that time and then review the gradual erosion of the corporate power of boards during the course of the past half century.

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For this paper the author wishes to give credit and express appreciation for the very important assistance given to him so graciously and freely by several individuals. They have reviewed this account in its initial form and given freely of their time and expertise in the clarification of both interpretation and historical accuracy so essential for a brief overview of such a highly complex development. They are Historians Jurgen Herbst of Wisconsin (himself engaged in a thorough study of the government of the early colleges in this country) and Francis N. Stites of San Diego State College (who recently published a book on the Dartmouth College Case), Professor Emeritus W. H. Cowley of Stanford University (who has been engaged in an historical analysis of higher education for many years and who is one of the leading scholars of the field), and Alan Karp,

doctoral candidate at Teachers College, Columbia University (who is engaged in an intensive historical analysis of the corporate basis for English universities from Roman antecedents to the days of the Tudor monarchs). Their assistance has proven of critical importance to the author who wishes to make quite clear nevertheless that any errors of fact or intrepretation must of necessity be his.

E.D.D.

PROLOGUE

In May 1745 the colonial legislature of Connecticut passed "an act for the more full and compleat establishment of Yale College in New Haven."* The legislation specified "that Tho. Clapp, Sam Whitman, Jared Eliot, Ebenezer Williams, Jonathan Marsh, Sam Cooke, Sam Whittelsey, Joseph Noyes, Anthony Stoddard, Ben Lord, and Dan Wadsworth shall be an Incorporate Society of Body Corporate and Politick and shall hereafter be called by the Name of The President and Fellows of Yale College in New Haven, and . . . shall and may have perpetual succession, and shall and may be persons capable in the law to plead and be impleaded, defend and be defended and answer and be answered unto, and also to have, take, possess, acquire, purchase, or otherwise receive lands teneaments or hereditaments goods chattels or other estates to grant demise lease use manage or improve for good and benefit of [the said] College according to the tenor and donation and their discretion."** The Act further provided that the President and Fellows, as governing board, could receive and manage bequests and donations, have a common seal, manage the affairs and business of the College, elect and appoint the President and Fellows, establish laws, rules, and regulations for the management of internal affairs, and confer honors, degrees, and licenses as appropriate.

This Act of the colonial legislature of Connecticut presented a pattern of government which has characterized American higher education

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* The original establishment of the "collegiate school" which became Yale College was authorized in 1701.

** The Yale Corporation: Charter and Legislation, Yale University, 1952.

since that time, a pattern associated with a grant of corporate power given to a single non-academic board of control. The Act itself was not without general precedent in the practice of England in that era, especially as it established the control of the college in a "body corporate and politick," but it also grew out of the conditions of colonial New England. As one might expect in the transfer of one societal practice to a related but emergingly different culture, modifications would be introduced which in turn would prove precedents for the new country. In this sense, the form of government devised for Yale by a group of ten clergymen who in 1701 originally petitioned the colonial legislature for a "collegiate school" reflected in part a desire to protect the new institution from intrusions of religious unorthodoxy associated with its older sister, Harvard College. But it also anticipated the condition of the College as a private, if sectarian, corporation. This latter condition in turn proffered an arrangement to be used by the overwhelming majority of the colleges which were to follow.

The point here is not that the establishment of the colonial colleges, nine of them in all, as chartered corporations provided them with the kind of institutional autonomy we have known in the twentieth century. Quite the contrary, until the turn of the nineteenth century they were generally viewed as public institutions, subject to direction and control, as necessary, from governments. What did evolve was an autonomy based upon the corporate form, an autonomy established as a legal and thus operational principle by the Supreme Court of the United States in the famous Dartmouth College Case and in succeeding decisions. In this regard it gained protection associated with the rights of individuals for personal freedom and

private property which accompanied the Lockean conceptions of natural rights so influential in the founding of the new nation. In this sense, government depended upon the consent of the governed. In their essential nature the governed were individuals banded together for effective social action. The government they formed had the obligation to protect their persons as individuals and their possessions and property. Since a corporation existed under law as a juristic individual, it subsumed in part the natural rights of individuals.

For private colleges the corporate charters granted to governing boards became shields which warded off the more direct political intrusions from external forces. Public colleges in their turn were to achieve a similar autonomy in practice by their establishment as public corporations. The result was a system of higher education distinctive in the western world for its independence from control by the state.

Although its origins lie in Roman law and medieval practices, the concept of the corporation within which the colleges in this country were so formed is that which matured in Tudor England. The corporation had served as a mechanism whereby the King could establish his authority yet delegate in an orderly way activities beyond the government's immediate capacity. Such corporate entities originally included municipalities, charitable establishments, and the universities, but later business enterprises received the same kind of authorization.* In the English tradition, charters provided for the perpetual succession of members of the

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* In Elizabethan times the chartering of commercial companies served as a means of fostering English trade abroad when the government lacked both means and finances to do this directly.

corporation and the right to control internal affairs subject, however, to visitation by representatives of the founders or the state. These corporations had under law the rights of real persons in the sense of being able to sue and be sued and to hold property, separate from the individuals who constituted the organization at any one time.

For this analysis, the Yale Charter of 1745 marks a departure from the English form of corporate organization associated with its universities, anticipating a distinctively American type of governance for higher education. As Historian George P. Schmidt comments in his history of Rutgers and Princeton, "the Yale charter created a board of trustees made up of colonial officials, leading clergymen, and prominent lay leaders, all of them external to the faculty." "It did not take long," he continues, "for this form of organization to demonstrate its usefulness in the competitive, rapidly changing, and loosely governed American society." (page 9)

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PART I: MEDIEVAL AND ENGLISH PRECEDENTS

Clearly, social institutions do not appear "full blown" as the creation of individuals or groups or even societies at any one time in history. Each generation cannot help but be the product, to a lesser or greater extent, of its past. In this sense the cultural roots of western societies go deep into ancient times. However, contemporary western culture has emerged in the aftermath of the dark ages, fashioned from medieval precedents by means of influences associated with the Renaissance and Reformation and the mercantile revolution which accompanied them. A most significant aspect of this historical evolution from medievalism to modernism was the emergence after the thirteenth century of national states and the breakdown of the hegemony over Europe of the Roman Church. In the sweep of man's more recent history, the Middle Ages can be called the womb from which our contemporary society emerged to begin a process of maturation now in its adult years.

MEDIEVAL ORIGINS

One major societal institution intimately connected with this great cultural epoch has been the university. The university is a medieval institution lacking organizational precedents in either the Arabic-Byzantine or Greco-Roman past. One finds it both a result of and an active agent in the great intellectual awakening of the twelfth and thirteenth centuries during which the ideas of Aristotle swept north and east out of Spain, and later west from the eastern Mediterranean, to initiate the great strides made by modern man in his ability to understand the nature of himself and

his social and physical universe. For all the opposition of medieval churchmen, the monk Abelard early in the twelfth century precipitated a controversy over the nature of life and reality which gave a sharp edge to the explorations of western society during the following centuries. And it was Abelard more than any one other individual who as a great teacher attracted to Paris the first of the hundreds and then thousands of masters and students whose congregation in that city initiated the foremost university of its day. A century and one-half later another famous Parisian master, Thomas Aquinas, was preparing his monumental work, Summa theologica, in which he consumated the "marriage" between the fundamentals of Christian faith and the rational observations of Aristotle. In the eighteenth and nineteenth centuries the universities (this time in Germany) once again assumed leadership for the rise of science and empiricism associated with what has been called the second great intellectual awakening of the western world and which has extended by another major step the beginnings of rationality associated with the medieval era.

The university, therefore, cannot undergo an historical review out of the context of its times. It began as an institution which owed not merely its initial form and traditions but its very existence to a combination of accidental circumstances. But its subsequent development "was determined by, and reveals to us, the whole bent and spiritual character of the age to whose life it became organic." (Rashdall, I, p. 3) The fact that it remains today an institution vital to its culture attests to the fact that it has remained germane to the twentieth century as it was to the thirteenth, in a condition of interaction with its societal environment.

Organizationally, we find the original university,* as one of many institutions in the medieval Church, subject first to the local bishop, and then to the Papacy itself. It was ecclesiastical and clerical, and its scholars wore the robes and held the condition of this association. It also looked to the political world, for universities took form at a time when the Plantagenet kings were in the ascendancy and beginning to compete with the Church for dominance in England and northern France. France and England and the German states and Italian cities had begun their rise to power as major political forces. The Holy Roman Emperor had achieved a status that enabled him to meet on even terms the Pope himself. In the reality of European power, the Sacerdotium, Imperium, and Studium existed almost as the three pillars which sustained, in the words of Hastings Rashdall, "harmonious cooperation the life and health of Christendom. . . . As all priestly power had its visible head and source in the city of the Seven Hills, as all secular authority was ultimately held by the Holy Roman Empire, so could all the streams of knowledge by which the Universal Church was watered and fertilized, be ultimately traced as to their fountainhead to the great universities, especially to the University of Paris." (I, page 2)

By the thirteenth and fourteenth centuries, therefore, the universities had achieved influence on a level with the Pope and Holy Roman Emperor in the affairs of Europe. On one occasion the Pope himself withdrew from

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* In terms of this analysis -- and in general -- the northern universities of Europe whose pattern was set by that in Paris have provided the lineage for the institutions of England and this country. As noted in this study, Paris was called the "mother of Universities."

a position of faith in deference to the learned doctors of Paris. (Rashdall, I , pages 552-3) History documents the role of the Parisian masters in the extended efforts on the part of churchmen and kings to end the great Papal Schism at the close of the fourteenth century. (Rashdall, I, pages 471ff) A number of factors undergirded the University of Paris in the achievement of its late medieval status and influence. One cannot deny the astuteness of its masters in playing off Pope and King against each other to the benefit of their society and the freedom they accrued therewith. Nor can one overlook the evident factor that until that time not only Paris but other universities had led in the changes of theological thought and thus benefitted from this position of leadership. Also, their graduates assumed positions of importance within Europe and especially the Church. However, the particular organizational form adopted by the universities and epitomized by Paris supported the autonomy achieved by its masters and their position as a major force.

The universities prospered not only as influential centers of intellect but as organizations which made the transition from guild to corporation in an effective manner. Among the universities, that at Paris stands out for both the status of its masters and the effectiveness of their institutional arrangements. As the great "Mother of universities," its scholars through their various migrations participated in the origins of nearly every other medieval university in northern Europe. (J. P. Davis, I, page 256) In the words of Rashdall, "here under the very palace of a despotic king, in the midst of subjects almost without municipal privileges, and placed under the arbitrary authority of the royal provost, was a body of educated men protected by the sanctity of their order against

the hand of secular justice, possessing the right of public meeting, of free debate, and of access to the throne." (I, page 541) Paris set the example upon which the universities of England drew to organize and conduct their own affairs.

The rise to great European influence of the University of Paris lay clearly in the connection between the old and new social forces of the medieval period: a transition from an informal assemblage of masters and students gathered around the cathedral schools of Paris in the turbulent excitement of a newborn spirit of learning to a formal, established institution which provided access to prestigious and influential careers as theologians and lawyers in the Church. The transition was marked by two conditions. The scholars of Paris grouped themselves formally into an organization with offices and councils which became greater than the individuals who served them. In effect, the organization gained a life of its own which continued permanently through changing constituencies which looked to it for their composite existence as a center of learning. It achieved concurrently a legitimization from external authorities which confirmed it as autonomous unity, in effect a government in its own right. While the first of these two conditions served as an essential preliminary to the second, it was the second which constituted the significant precedent for university organization in England and then the United States. This marked, formally and significantly, a move away from the medieval guild system to organizational arrangements in keeping with the new forces at work in Europe which ushered in the capitalist world.

In many respects, however, the early corporations continued to resemble the guilds which preceded them. In a survey of the early foundations of

corporate law, for example, Samuel Williston notes the similarity between early municipal corporations in England which exercised "a minute supervision over the inhabitants" and the guilds or companies which did the same thing on a more restricted scale. "They made by-laws governing their respective trades." (Williston, pages 108-9) Certainly a universal characteristic of medieval times was that of associations of individuals banded into organizations to promote their common interest and to provide protection. The extent to which these appeared simply as voluntary associations of individuals with affairs in common or to which they were formed under charters or grants from kings or other rulers is not clear. Apparently, both conditions existed. The primary point for the history of universities lies in the fact that medieval life did support the idea of corporate associations holding an inherent life of their own and that these associations served a variety of activities ranging from religious orders to mercantile and craft associations. It is clear also that guilds gave way in time to formal, chartered corporations. (J. P. Davis, I, Ch VI; Gierke "Introduction"; Brody, pages 1-2)

Accompanying the shift from guild to corporate form in the sense of this description was the gradual use of the term "university" to designate the institution as such.* Originally the expression universitas denoted

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* "There was originally no necessary connection between the institution denoted by the term universitas and that denoted by the term studium generale. Societies of masters or clubs of students were formed before the term studium generale [to denote a university] came into habitual use; . . . . The university was originally a scholastic guild whether of masters or of students. Such guilds sprang into existence like other guilds without any express authorization of king, pope, prince, or prelate. They were spontaneous products of that instinct of association which swept like a great wave over the towns of Europe in the course of the eleventh and twelfth centuries." (Rashdall, I, page 15)

simply a unity or body of persons. The salutation universitas vestra, for example, meant merely "the whole of you." Gradually, however, this word took on a different connotation and served by the thirteenth century to designate "corporations of either masters or of students" as well as other forms of corporations such as those associated with guids or municipalities. (Rashdall, I, pages 2 and 8) Subsequently, according to Freidrich Paulsen, "the name university displaced the other titles, after which, with the entirely modern rounding out of the term into universitas litteratum, it was used to designate the teaching institution as such." (Page 21)

Another evolution associated with that shift from the free association of the guild to the formal corporation arose out of the necessity for the university societies to look for sponsorship and thus for support in their conflicts with the local communities and bishops. The remote but potent backing of the pope or king loomed as far more appealing to the immediate supervision, frequently backed by force, of town officials and bishops. In retaliation to local incursions growing out of town-gown conflicts, some of them quite bloody, the officials of the university turned to higher authority, the Pope and the Holy Roman Emperor at first and later the Pope and national king. A bargain resulted. The university obtained essential protection. The Papacy extended the control it sought over various units within its extended domain: religious free orders, cathedral chapters, and other religious groups as well as universities. The kings, in turn, were helped to solidify their expanding authority by the formal establishment of their sovereign right to legitimize organizations within their realms. (Reeves, pages 67-9; Rashdall, I, Chap V)

The legal mechanism used to carry out the shift from guild to corporation was the application of medieval interpretations of ancient principles of the corporation as a fictitious or legal person found in Roman law. The idea of a corporation as such apparently has its roots in antiquity. In Rome, corporate bodies possessed common treasuries and had a legal life separate and distinct from the individuals comprising them. The principle applied initially to villages, towns, and colonies but in time was extended to associations of priests and of artisans. (Williston, I, pages 106-7) Whatever the use of the conception to which the Romans applied it, it did open to the Canon lawyers of the late twelfth and thirteenth centuries a line of reasoning by which the Papacy sought to counter the impending power of kings and national states.* As Alexander Brody stresses in his brief summary of these corporate origins, "the Imperium (absolute power) of Roman law is the parent doctrine of the modern 'concession' theory of corporate life, the theory that corporate existence is a privilege conceded by the state." (Page 6) In the immediate sense, this rationale did provide a legal basis for the sovereignty of the Pope and did establish the existence of universities as based upon the delegation of this sovereignty rather than in terms of their being as a free association of scholars.**

Initially, the charters conveyed legal, formal recognition to existing institutions. Thus, as Rashdall documented, about 1210 the University of

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* The extent to which in doing this it ultimately opened the door for the kings and national states to accrue power at the expense of the Church's mundane influence remains a question for conjecture.

** The question of papal charters is a complicated one. Unfortunately, in terms of their implications for the medieval universities, Hastings Rashdall who is the recognized authority on these early institutions did not review the question in any detail.

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After the turn of the thirteenth century, therefore, the university at Paris and other universities in northern Europe had created a formal, unifying organization capable of responding effectively to intrusions from both towns and bishops. Concurrently by the grants of immunity from local sureveillance made to them, again especially at Paris, they achieved not only a local autonomy and thus identity as what today one might call a "community of scholars" but they gained for themselves an identity throughout Europe as institutions of a special and important character. They coalesced from relatively unstructured gatherings of students and masters to formidable organizations, the special offsprings of Pope and Emperor. It was universally accepted "that the erection of a new studia generalia was one of the Papal and Imperial prerogatives, like the power of creating notaries public." (Rashdall, I, pages 8-9) By the turn of the century, also, the Papal and Imperial bulls conveyed a more fundamental quality; namely, that of the ius ubique docendi, the right of graduates to teach throughout Europe, and this became the prime advantage of papal and imperial authorization.*

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* Supporting the desires of the Pope for the maintenance of the Church organization, the masters of Paris on their side were engaged during this period not only in continuing quarrels with the townsmen of Paris but with the Chancellor of the Cathedral Church of Notre Dame. The latter traditionally held great power over the emerging university by possession of the right to license teachers. As Professor W. H. Cowley comments in his survey of medieval origins of universities, the Chancellor and his superior, the Bishop of Paris, "had no intention of turning their power over to the upstart guilds of teachers. Inevitably a bitter battle developed between the emerging university and these ecclesiastical officials, neither of whom had any position whatever in the university. Authoritative historians leave no doubt about the fact that the external ecclesiastical authorities of the Diocese of Paris controlled the University during its early period and that it took deft political negotiations for the masters to shackle their powers." (1964, Ch. 1, pages 8-9) As noted above in this analysis, the University escaped the control of the Bishop by acknowledging that of the Pope and of the townsmen by acknowledging that of the King.

At the same time that the universities obtained privileges and protection they accepted a relationship which obligated them to these higher authorities. Thus, the concession theory of corporate existence appeared as a part of medieval legality so influential in the English and American practice. The process began with the 1210 Bull of Pope Innocent III by which he not only granted official recognition to the University of Paris but also the right of its members to elect a proctor to represent it in the Papal Court. By this latter permission, "the society acquired, in modern phraseology, the right 'to sue and be sued' as a corporation." (Rashdall, I, pages 300-1) In effect it was a recognition of a society or corporation already in existence, but nonetheless one which presaged ultimately the end of the voluntary or spontaneous societies identified with medieval life. It prepared the legal ground for a relationship more completely developed in the theory of Papal control over all church organizations of Innocent IV in 1243. Alexander Brody in his book, The American State and Higher Education, summarizes the implications of the Innocentean doctrine as follows:

> As an eminent jurist and canonist, Innocent IV, anxiously watched the drift of politico-legal theory toward the establishment of the supremacy of the state. The emerging forces of political nationalism threatened the papal claim for exclusive dominion. He therefore saw the need of a juristic redefinition of the ecclesiastical power. The legal rubric which would subsume and ultimately fix the supremacy of the Roman See over church domains he found in the Roman law of corporations. The central idea in the Innocentean doctrine may be restated thus: Each Cathedral Chapter, Collegiate church, religious fraternity, university, etc., is a "Universitas," i.e., a free corporation. But its existence, its personality is not something real, not a "natural" fact expressive of a collective body; rather its personality is purely "fictitious." It is merely an artificial notion invented by the sovereign for convenience of legal reasoning. In short, the corporate life of the group is not a social reality, but a legal conception -- a "nomen juris" which exists only in contemplation of law. (Page 3)

Paralleling the actions of the Pope and the Emperors, national kings also competed for the right to establish universities.* As the course of history went against the Church, national states under the control of kings increasingly independent of Papal authority gained the ascendancy in Europe. As the Papacy was shaken by internal discord and by enmeshment in the politics of Italy, they lost both [redacted] status and influence. (Curtis, page 22) What the Pope had begun, the kings carried forward; sovereignty assumed a national quality. The German universities, although internally in the Parisian pattern, were established as an integral part of government by its Prince upon authorization from Pope and Emperor. Later in Spain the king authorized universities without Papal legitimization. In Paris, by the latter part of the fifteenth century in the reign of Louis XI one finds evidence of what Rashdall calls the "extinction of the last relics of the old independence and influence of the University." (I, page 429) In 1573 the Parliament of Paris declared the University to be a secular and not an ecclesiastical institution, subject to domination by the national state.

This hewing out of the relationship between universities and governments (both theological and temporal) was thoroughly intertwined with the

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* About 1200 the French King, Philip Augustus, responded to appeals from the University of Paris following strife with townspeople and local officials, and conceded special privileges and rights to the university society. As John P. Davis summarizes the situation in his historical survey of corporations, by that time "the University of Paris had so developed from the Cathedral Schools that its masters and scholars were recognized by both Pope and King as a distinct class of persons in comparison with monks and canons of the Church and townsmen of Paris." He continues by affirming that "conditions in Paris are found almost exactly duplicated in Oxford where the authentic history of the first English university begins." (I, page 264)

shifting political and economic conditions in the Middle Ages. Within this context the idea of a corporate form by which a sovereign retained the right to authorize the existence of societies with his realm constituted an appropriate mechanism for maintaining the organizational life of Europe and especially of England in the void being left by the erosion of the guild associations. Further, it fitted the need of national states to control the economic and municipal associations of the new commercial-industrial age.

Two fundamental aspects of the corporate form as it was conceived by the canon lawyers and implemented through papal and royal authority fitted especially well the post-medieval era. One was the "fiction" theory of the personality of corporate bodies, or universitas. The other was the idea of corporate existence as a "concession" from superior authority.* The development of both set precedents guiding future relationships of the state and universities in England. The "fiction" theory of Pope Innocent IV was related to essentially metaphysical concepts of the individual as a being and thus corporate bodies as personae fictae, fictitious persons in law. As such, they lacked body and will, and could not be excommunicated, a ban which fell upon individuals or singular persons. In terms of the times, one can see that such an interpretation provided a very substantial protection to the universities in their rivalries with the local bishops and other Church officials. Concurrently, as noted above, the

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* These two basic concepts are explicated quite fully in an article by John Dewey, "Historical Background of Corporate Personality." Yale Law Review, April 1926.

"concession" theory established the necessity of external legitimization and thus led to the ultimate subjection of universities to the state. As Brody has pointed out, this theory of corporate existence promulgated by the Popes was "destined to alter the whole medieval political structure and ultimately to bring about the extinction of semi-independent associations." (Page 3) Until the emergence of purely business corporations in the nineteenth century, organized for private profit, the concession idea gave to governments (usually the king) the basis for delegating without losing control activities deemed in the public interest but beyond the scope of the administration of the state itself. In time, however, this practice combined with the companion idea of a corporation as a fictitious or judicial person to give to corporations many of the protections associated with individual freedom and property rights as they in turn took form in the eighteenth century.

THE ENGLISH UNIVERSITIES

Within three decades of the arrival of the first settlers in the Bay colony, "a timber building on the English collegiate model was erected, and there the traditional Arts and Philosophies and learned Tongues were taught, and the standards, forms, and amenities of English universities were reproduced, so far as the slender means and austere principles of New England would permit." (Morison, 1935, page 4) The Puritans were determined to erect a new Cambridge as well as a New England. For their model they looked to English practice.

The English precedents which served the colonists, however, had taken form during the three centuries following the formation of Oxford and

and Cambridge in the Parisian tradition early in the thirteenth century. Continental patterns which crossed the channel to shape Oxford changed under the influence of the English culture. As much as Oxford at first resembled Paris, it equally surely had changed by the days of Queen Elizabeth. The differences inhered in the economic, political, and social life of England as it achieved a national character. This character reflected the struggles for supremacy and power between the Kings of England and of France, the expansion of commerce and rivalries with continental merchants, the emergence of rudimentary industries, the formation of a middle class holding power based upon wealth rather than the military might of barons and lords, the appearance of some prosperity and certainly a bit of independence for the common man, and more immediately the victory of the kings over barons and Protestants over Catholics. It reflected as well the nature of the Renaissance and Reformation periods in three turbulent centuries during which the medieval way of life slowly eroded and disappeared.

The conflicts of that era which marked the transition away from a feudal society to one more national, commercial, and industrial in its essentials were primarily political and economic in nature. Yet, they affected the total life of England, including both that related to the universities and that related to the corporations in general.

Within this very general cultural shift, there emerged a custom-based common law as a guiding legal force in England, a law which over time supported increasingly the rights of individuals against the will of the state, especially the Crown. It led ultimately to the conception of a charter as an instrument which protected the autonomy of its recipient just as well as the imperative of the grantor.

Similarly, during this era the universities also were changing in ways which responded to and indeed were enforced by the broader cultural shifts of England. Within the complexities inevitable in an historical overview of one segment of a total society, efforts to sift out the more significant facets are difficult and at best arbitrary. However, for the evolution of the corporate form three transitions would appear to explain the shift from the medieval to the Tudor universities:

> The transition from a dual source of legitimization of Pope and King to a single source; namely, that of King and later Parliament, as the national state assumed all temporal power in Europe.
>
> The transition from legitimization by increments in response to specific situations in the form of Papal bulls and royal statutes to that by a formal and complete charter which established the legal existence and governmental form for the universities and their colleges.*
>
> The transition from a conception of the university as a single corporate being to a conception of the university as a confederation of colleges established as corporate entities.

Legitimization by National State

When in 1533 Henry VIII decreed himself supreme head of the Church in England and broke with Rome, he had delivered into his hands all charters and statutes of the universities. This action dramatized a succession of royal acts by which the Crown confirmed its control of Oxford and Cambridge. The English monarchs of that era were drawing into their hands the sovereign power of the country, a process initiated two centuries earlier by the Plantagenist monarchs.

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* Which latter action occurred during the reign of Queen Elizabeth.

With the Pope excluded effectually from his medieval power in England the universities depended solely upon the Crown for the concession which gave them both legal and real bases for their corporate being. The shift had become fixed and final after Elizabeth ascended to the throne in 1558. Very early in her reign she confirmed a Parliamentary statute which established the chancellor, masters, and scholars of Cambridge and Oxford by the sovereignty of the state as the incorporated body. (Curtis, page 25) In the same year she sponsored statutes to govern Cambridge. Finally in 1636, under Charles I, as Chancellor of the University, Archbishop William Laud prepared and issued a set of statutes for the government of Oxford which remained in effect until the nineteenth century. By that time no residual question remained concerning the sovereignty of the state as the source to which the universities must look.

The nature of this transition appeared most clearly in the changing position of the Chancellors of the two universities. Initially in the thirteenth century, this officer served as appointee of the Bishop (as he did at Paris in that day) to represent him to the university. The Bishop was the external authority, in turn representative of the Pope himself, whose approval was necessary for all matters not strictly internal.* In the words of Rashdall, the masters were "bound by oath or solemn promise to obey both the chancellor and the university: each authority supreme in its own sphere," (III, page 54) for as clerics and members of the Church both master and scholars schieved autonomy from lay control on the basis

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* As noted previously, in Paris the University grew out of the Cathedral schools and, like them, was subject to the authority of the Bishop. It was not until the masters became strong enough in their status and organization and rambunctious enough in their aspirations that they pressed around the Bishop to the Pope for their rights and privileges. The influence of the Pope was far less significant for the English universities than for those on the continent, especially in France.

of the prior jurisdiction of the Church. The Chancellor was the Church officer with whom they had most direct contact.

First at Oxford and then at Cambridge, for a variety of reasons which go beyond the scope of this analysis, the universities slowly absorbed the chancellorship into their own province. In large part this reflected the accretion of autonomy from local forces, both town and church, achieved by the universities in their appeals to Pope and King in the continuing disputes and open conflicts which characterized town and gown relations. In the course of this era the universities gained the initiative in the selection of Chancellors. To begin with university officers nominated the candidate to the Bishop for his approval, an act which in time became a formality and in practice this officer became the representative of the university to the Bishop, and ultimately to the King himself, the protector of its rights and privileges.

The universities, especially at Oxford, achieved their greatest independence by the latter part of the fourteenth century, in the exercise of which the masters and scholars at Oxford became involved in the religious doctrines of John Wycliffe and his followers. These were deemed heretical by the Pope and vested clergy of the Church. By the closing decades of the century the Crown, equally fearful of the reforms pressed for by Wycliffe and his adherents and frightened by a peasant revolt inspired by their teaching, joined with the Church and put an end to the "heresy."*

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* "Just as Paris had suffered from a rash of heretical teachings, mostly under the guise of Nominalism and Averrhoism, so Oxford had its outbreak. But the movement at Oxford went far deeper and proved of immensely greater importance than in Paris. It was a true reform movement, which, had it proved successful, would have anticipated Luther and the Protestant Reformation by centuries. The Pope and the vested clerical interests were not unaware of the true significance of the Oxford movement. They moved heaven and earth to crush it, and Oxford found itself for years a battleground of diverse, inimical interests, in which the University, after a brave and gallant start, was shattered almost beyond repair." (Schachner, page 214)

The Oxfordians remained adamant through the turn of the century, preaching the teachings of Wycliffe even after his death in 1384. Finally, in 1411 the Council of London condemned the heresies at Oxford and the Crown and Church moved jointly and vigorously to assert their authority over the University. The masters lost their liberties and privileges, and the University its great perestige, sapped for more than a century not only of its great intellectual vigor but its students as well. In the words of Schachner, a "tamed remnant harkened to Bishop and Archbishop alike." (Page 220) The Chancellor became the representative of the institution to the Throne, nonresident and less interested in university affairs. From that time on the power shifted inexorably to the King. By the sixteenth century, the Chancellors served not so much as ambassadors or advocates for the universities as almost royal ministers of education, subject to the directions of the Crown. (J. P. Davis, I, pages 279-82; II, pages 5-8; Curtis, pages 19-20)

Formalization of Corporate Charters

Although Pope Innocent IV and his legal advisers had developed by the time of his famous Bull of 1243 a theoretical basis for the corporate status of universities, practice based upon this conception followed slowly and intermittently in reactions to crises and appeals. This formative period was one marked by the issuance of various Papal and Royal decrees and statutes responding to immediate circumstances. However, custom slowly hewed out precedents and did prepare the legal foundations for the nature of the corporate form as it ultimately gained more rigorous dimensions in Tudor England of the sixteenth century. These early actions are recorded amidst the accounts of problems and disputes seemingly inevitable when masses of masters and scholars from various distant parts of England and even the continent intruded themselves into the life of a local town. Out

of the conflicts with town officials and townsmen the universities over time accrued support from the King whose statutes conceded to them special corporate privileges of self-government and autonomy from local officials. In their dispute with the Bishop and local Church officers, the universities appealed to Rome to gain a similar corporate autonomy based upon canon law. The outstanding example of how this dual evolution took place occurred early in the history of Oxford in 1209 when the scholars responded to attacks by the townsmen by migrating. They returned only after the joint intervention of the Pope and King John forced the locals to pay indemnity and to subject themselves to acts of contrition and accede to the rights of the University as an autonomous body.

During the later medieval period of the fourteenth and fifteenth centuries the centripetal flow of power to the Crown dissipated the influence of the Church officers and of the local guilds, towns, and baronages. By the time of the accession of the Stuarts at the end of the sixteenth century, English kings had committed themselves to the use of the corporate form as an exercise of the authority of the Crown. James I and his advisers had supported the so-called fiat doctrine under which the central government of the state extended its control over the economic and political life of the nation, including guilds, boroughs, and trading companies, as well as philanthropic societies including the universities.* The concept of

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* "During the reign of the Tudors and of James 1, whatever spontaneity existed in group formation tended to disappear with the reemergence of the old Roman and papal fiat theory that a corporation could only be created by proper authority -- royal assent as manifested by charter or special act of Parliament (except for well-established corporations like an officer or the City of London which did not fit the theory and were sanctioned by virtue of office or by prescription) -- thereby justifying increased governmental control and taxation. Even Lord Coke subscribed to and advanced such views. This theory, which came to be known as the 'concession theory' because corporateness is treated as a concession from the state, differs from the 'fiction theory' only in emphasis, and is the cause of some strange modern consequences." (Henn, page 14) As this author footnotes, incorporation by a special act of Parliament did not become the more common practice until the latter part of the 18th century.

corporations had matured sufficiently to be included in the initial systemization of English common law by Sir Edward Coke early in the seventeenth century and more fully by Sir William Blackstone a hundred years later. (Williston, pages 114-5)

In terms of the focus of this analysis upon the application of corporate form to universities and colleges, it serves little purpose to elaborate this evolution. In the main, the medieval forms of voluntary associations which grew up around the feudal manors and the courts of barons and kings had atrophied through "a chaotic mass of exemptions of subjects from feudal obligations." (J. P. Davis, II, page 241) In the three centuries which preceded the reign of Queen Elizabeth, the English common law had slowly congealed into a formal system which incorporated to a limited degree elements of Roman Law and the Canon Law. An act in 1504 under the reign of Henry VII, for example, asserted the suprenacy of common law and the central government over guilds and corporations by subjecting their ordinances to review by the Chancellor, Treasurer, and Chief Justice of the Royal government. By this time the use of the term "corporation" had become common and its application to municipalities, ecclesiastical orders, educational and eleemosynary associations, and economic societies was customary.

What is important for this analysis is the fact that despite intrusions of the Crown directly into their internal affairs, usually the result of religious conflicts, the universities and their colleges did maintain their corporate identity and did <u>not</u> become agencies or departments of the state itself. Two important attributes of the corporate

form served to support their autonomous identity, each having its origins in Roman and later Canon law.*

The first, as noted above, was the idea of a corporation as a fictitious person, having something of rights of individuals under law. This distinction between the corporate entity and its individual members served in later centuries as an essential ingredient for the maintenance of early voluntary associations, such as guilds and municipalities, during the years in which the Crown was establishing its suprenacy. The principle also undergirded institutional autonomy during the later centuries of the Tudors into the realm of the Stuarts as English common law increasingly recognized the rights of individuals in competition with the powers of the state. In this sense the evolution of the corporation to its contemporary context as a body with rights under law related to the broader evolution of the concept of an individual as the basic social unit. "Only when the background of individual rights and obligations became plain to

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* Although the universities and their colleges retained a corporate identity, the nature of their autonomy was another matter. Alan Karp states this condition in terms of his research into the corporate nature of the English universities leading up to their status during the reign of the Tudors and Stuarts. "The fiction and concession theories," he stressed (in a letter to this author), "were mechanisms by which the Crown could make institutions state agencies in the sense of control without absorbing them into the government itself. Problems of academic autonomy became increasingly intense in Stuart England, the period in which these legal theories were actively used to bolster the Royal prerogative. Under the Tudor-Stuart system of patronage the freedom of the colleges was abridged as heads became nothing more than Crown appointees, statues to the contrary notwithstanding. It was also in this period, and under the Stuarts in particular, that Royal recommendations and mandates to elect vacant fellowships and scholarships became increasingly regular. Many of these were accompanied by dispensations from local statutes that might otherwise inhibit the election of the King's choice. . . . As for the universities, they would not dare elect a chancellor of whom the monarch disapproved." In other words, although the universities did not become a part of the government of the English state, they by no means enjoyed the kind of autonomy associated with universities and colleges in the modern sense of things.

the eye of English law was it able to see corporate rights standing out in relief against it." (J. P. Davis, II, 242-3) English common law in time accepted the individual citizen as the recipient for the powers left unabsorbed by the state. In this sense, therefore, the idea of "bodies of citizens (as units) enjoying corporate powers" had no legal existence. (J. P. Davis, II, 242) The residual rights, including the holding of property, belonged to some person and the corporation in order to hold the same rights had to be viewed, legally, as a person.* Thus, the rights of individuals carried over to corporations, a condition which sustained the separation of church and state and college and state in the American colonies.

The second corporate attribute reaffirmed the concession theory under which the corporate form served as the means by which the King or Parliament provided for activities deemed desirable. The early trading companies (such as the East India Company and the Levant Company) illustrate this principle. They were formed as a profit-making opportunity for their

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* J. P. Davis (II, page 243) suggests that if the history of English law were divided into periods, they might be as follows: "(I) The feudal period, ending in the middle of the twelfth century. (II) The post-feudal period, until the end of the fifteenth century, during which the English system was slowly evolving itself from the feudal system through a mass of exemptions from its principles. (III) The first individualistic period, the sixteenth and seventeenth centuries, during which the elaboration of the system on the basis of the individual was impeded by the absolutism of the Tudors and Stuarts. (IV) The modern system of law, dating from the last quarter of the seventeenth century, based on the individual and afforded nearly complete development through democratic government. During the first and second periods the personality of corporations was not recognized by the law, except imperfectly at the end of the second period. In the third period, the soil of absolutism in the state proving very fertile for the legal conception of corporations, it matured fully. In the fourth period, at least until after the beginning of the nineteenth century, the conception has undergone no change, having apparently become firmly established as a part of the law."

members, of course, but also they encouraged private capital to promote the ends regarded as in the public good. They created a commerce necessary for the prosperity of England. Later, the colonial companies (such as the Virginia Company, the Massachusetts Bay Company, and the Hudson Bay Company) in the same manner promoted colonization as an economic and political extension of the empire.* The English universities similarly owed their corporate existence to the grace of the state to carry out purposes which, in the English tradition, the state did not undertake directly.

Within this transition, it was in 1571 under Elizabeth when Parliament passed and the Queen approved legislation incorporating them. "Henceforth they were to be known legally as the 'Chancellor, Masters, and Scholars of the University of Oxford' and the 'Chancellor, Masters, and Scholars of the University of Cambridge.'" (Curtis, page 25) Accompanying the acts of incorporation went the seal to authenticate their acts, the authority to possess and manage properties, and the right to sue or be sued. Most significantly "was the confirmation of their charters and all

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* "The corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked upon as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds. In a little book, entitled 'The Law of Corporations' published anonymously in 1702, it is said: 'The general intent and end of all civil incorporations is for better government, either general or special. The corporations for general government are those of the cities and towns, mayor and citizens, mayor and burgesses, mayor and commonality, etc. Special government is so-called because it is remitted to the managers of particular things, as trade, charity, and the like, for government, whereof several companies and corporations for trade were erected, and several hospitals and houses for charity.'" (Williston, page 110)

the privileges, liberties, and franchises" that derived from these actions. (Curtis, pages 25-26)

Evolution of the Colleges

The Universities of Oxford and Cambridge moved away from the continental pattern in many respects during the middle and late medieval period, but perhaps the most dramatic was the emergence of the colleges as residences for students and as the primary centers for educational programs and governance. Their immediate predecessors were the original living halls. In the early years students seeking protection from violence and profiteering by townsmen banded together for communal or cooperative living. In time, these residences became hostelries run for profit by "shrewd, business-like graduates" who rented large houses and "persuaded the parents of the youngsters . . . that the boarded students would be under good moral supervision, their bodies and souls being equally safeguarded." (Schachner, page 221) By the fifteenth century, however, the profiteering excesses of their managers or principals as they were called, in turn led at first to supervision and then to control by the Chancellor of the University. In 1421, Henry V "enjoined that principals should receive only scholars of good character, and all scholars were required to reside in the halls of principals 'lawfully approved and admitted by the Chancellor and Regents.'" (Rashdall, III, page 171) What had begun as communes for mutual protection from the excesses of townsmen had become what today we would call campus dormitories organized under the direct supervision of university officers. It was within this pattern that the Colleges emerged. The transition, similar to that of other facets of the universities, came slowly. "Before the close of the medieval period, most of the halls

passed into the possession either of monastic bodies or of colleges."* (Rashdall, III, page 173)

According to most accounts, the colleges first appeared as philanthropic contributions to aid poor scholars made by wealthy patrons motivated for reasons of concern or religious contrition.** But their expansion in terms of their existence today was "almost entirely due to the outburst of activity arising out of the intellectual revival of the thirteenth and fourteenth centuries and culminating in William of Wykeham's Oxford foundation of the new 'college of St. Mary of Winchester in Oxford' to receive Scholars from the school he had previously established." (Mansbridge, page xvi) By the sixteenth century, except for some halls which lingered on in association with monastic orders affiliated with the universities, the colleges by the attractiveness of their living arrangements drew the masses of the students. They had assumed responsibility for education in the arts faculty (undergraduates in our frame of reference). As Rashdall notes, "it seems probable that before the middle of the fifteenth century the teaching of undergraduates was mainly in the hands of the tutors in the colleges or principals and their assistant regents or nongraduate lectors in the halls."

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* While the Colleges increased, the Halls were rapidly declining . . . Over sixty Halls are mentioned as surviving in the middle of the fifteenth century, but during the next two or three generations most of these disappeared." C. E. Mallet, History of the University of Oxford, Longmans, Green, 1924, Vol. I, page 410.

In his book, The Older Universities of England (Houghton Mifflin, 1923) Albert Mansbridge comments: "The Universities, as a result of the Elizabethan codes, by the beginning of the 17th century had become federations of independent and autonomous colleges." (Page 57)

** One of the first colleges at Oxford, Balliol, owes its establishment to the act of penance forced upon Sir John de Balliol for offenses to the Church. (See Schachner, pages 223-4).

(III, pages 231-2) When Brasenose College was founded in 1509, for example, it was assumed that the student need not go outside of his college for lectures. An association with religious orders also supported this development. At both Oxford and Cambridge, according to Rashdall, "the earliest patterns of actual collegiate life were supplied by the Mendicants." (III, page 294) Also, during this late medieval era "the Heads of Colleges began to exercise more influence in the University." (Mallet, I, page 410)

Of special pertinence for this analysis was the fact that colleges "according to medieval practice, experienced no difficulty in holding land and other property in their own names." (Rashdall, III, page 178) In general, the colleges maintained a corporate identity within the universities, in large part governing their own affairs -- except for occasional intrusions, usually for reasons of religious orthodoxy -- and holding the monies and properties provided for in their founding or given to them afterwards. It was only after the break by Henry VIII with the Roman Church and subsequent conflicts between Protestants and Catholics and among Protestant sects, that they suffered the kinds of surveillance and interference which affected their educational efforts and the lives of their fellows. Yet, despite the Crown's willingness to have its way in times of crisis the corporate being of the colleges continued in essence.*

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* J. P. Davis attributes the rise of the colleges in part to the reassertion of the Church of its control over learning. He comments that before the end of the medieval period, "the universities were eventually merely federations of colleges under the control of the Church. When the universities were throwing off the yoke of the Church, they were doing it as guilds of masters; when the Church reasserted its influence it did it through subordinate colleges modelled on its own corporations." (II, page 57) However, with the expulsion of the Roman Church the colleges, as the universities themselves, were obliged to the Crown for their legitimization.

"The Oxford colleges," he notes, "whether founded by churchmen or by persons under their influence, were so manifestly the fruits of a pious purpose that they were given forms of organization modelled on the corporate forms of the Church, while the permance of their constitution and the fidelity of their life to the purpose of their foundation was assured by their almost universal subjection to the visitorial authority of bishops." (I, page 315).

The organizational form specified, in general, by the corporate statutes establishing the colleges set up a kind of tripartite government. First there were the Visitors, successors of the founders and/or representatives of the Crown who in general had the power to investigate affairs at a college at their own initiative or upon request of an individual or group within a college and to compel compliance with their requirements. The Visitors were usually bishops or archbishops, although the King, the Chancellor, or some master of the University, a mendicant friar or private person also might serve. The specific authorities granted to them varied to a degree from college to college. Second was the head of the college -- warden, master, provost, president, or rector -- who was usually elected by the fellows, although originally not necessarily one of them.* Over time, this office shifted from an annual term to a permanent appointment. The head served as the administrative officer, overseeing the affairs of the college and its endowments and properties. It was this office which preceded the use of permanent chief administrators in the early colleges of this country. Third, the fellows, originally named by the founder and their successors, constituted the teaching staff and exercised legislative powers. The colleges functioned under the direction of internal fellows and their elected heads, subject to the

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* Not all heads were elected by the fellows of the colleges. Karp notes, for example, that the Warden of King's Hall at Cambridge was a royal appointee for part of its history, as was the Master of Trinity College at that university. As might be expected in an era of the development of form of governance, the founding statutes for the colleges contained variations in provisions providing for the role of the fellows and masters, as well as visitors as previously noted. But in general the formal or legal arrangements -- whatever violations existed from time to time in practice -- were based upon a conception of internal autonomy subject to overseeing by designated authorities usually called visitors.

overview of external visitors. (J. P. Davis, I, pages 303-5)

The colleges, then, by the sixteenth century constituted the basic units, educationally and organizationally, of the English universities. Of the more than fifty inns and halls at Oxford in the fifteenth century, for example, half had disappeared by the sixteenth and only eight remained when Elizabeth ascended to the Throne. (Curtis, page 36) More significantly, however, the new statutes of incorporation under the Queen capped the rise of the colleges by turning over the real power within the universities to the heads of the colleges. "Taking most of their former authority from the regent masters, it [this action] endowed the heads of the colleges or houses with broad new powers. . . . Now collectively they became the chief governing body of the university." (Curtis, page 42) As another historian commented, by the beginning of the seventeenth century the universities had become "federations of independent and autonomous colleges." (Mansbridge, page 57) As such they functioned within the legal framework associated with eleemosynary corporations.

LEGAL CONCEPTION OF CORPORATIONS

The use of the corporate form as the basis for the government of colleges in the early days of this country, therefore, reflected traditions closely related to the changing nature of western society. Roman law set the precedent for associations to exist in a corporate form. Early canonists of the Church turned to Roman practice to support a legal theory supportive of the need of the Papacy to assert ultimate authority over various Church bodies. Papal precedent in turn led kings of the new

national states to assume a similar authority, especially since Roman law presumed the dependence of corporation on the state for its legitimization. In England, the medieval forms of corporation in time came under the influence of a tradition of common law which by the fourteenth century had reached the stage of development that it proferred a body of rule and practice quite independent of Roman and Canon law. Some question exists concerning the nature of the interaction, if any, between continental, Roman and Papal, precedents and English usage within what we know as the common law. The use of the corporate form, however, continued to evolve in much the same terms of reference as its medieval predecessor.*

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* Regarding the question of the influence of Roman law in England, James W. Hurst, Professor of Law at the University of Wisconsin, writes that English law on corporations "responded to English experience." "There is little indication," he continues, "that English policy makers followed, or even knew much Roman doctrine." (Page 2) There is some evidence, however, that the early precedents, examples, or customs which English corporate practice followed were those associated with principles of Roman and Canon law as used within the Roman Church. As noted in a previous section of this paper the fiat theory of James I and the "fictitious person" conception had roots in prior legal ideas. Paul Harbrecht and Joseph McCallin write: "Englishmen knew the canonical concept of the corporation which Sinibaldo [Innocent IV] and the Decretalists [who contributed to the doctrine of Pope Innocent IV regarding Church corporate bodies] had constructed out of Roman law." They note further: "All over England in diocesan and legatine courts, the canon law insisted upon dealing with deans and chapters, abbots and convents as <u>personae fictae</u> in matters of ecclesiastical jurisdiction. The Canonists, in developing a <u>plenitude potestatis</u> for the Lord Pope, inspired the English Commons to create a <u>jus commune</u> for the Lord King." (Page 5)

This latter point of view is supported by R. W. Maitland in his introduction to Otto Gierke's book, <u>Political Theories in the Middle Ages</u>. (Page xiv) Referring to the "Italian theory of the corporation," Maitland remarks on how "it slowly stole away from the ecclesiastical courts, which had much to say about the affairs of religious corporations, into our temporal courts which, though they had long been dealing with English sub-units, had no home-made theory to oppose to the subtle and polished invader."

By the seventeenth century, this evolution reached the point that Sir Edward Coke in his Institutes and Reports could explicate systematically a theory of corporations in English life. (J. P. Davis, II, Ch. VII) It was the English practice of this century which influenced the American colonies, identifying the corporation as a body politic or body corporate erected "with the consent of the state, by common law, by prescription, or expressly by royal charter or act of Parliament." (J. P. Davis, II, page 211) The corporation had a legal identity conferred upon, or delegated to, a group of persons having a common interest, or interest in common, which conveyed to them a legal right to implement this interest in continuing succession. To do this, the corporation aggregate** could enact by-laws or statutes for the governing of its association, as determined by a majority vote of its members. As a juristic or artificial person, the corporate had the right, therefore, to sue or be sued, receive and hold properties and monies, and in effect act as a natural person within the law. These attributes of the corporation first summarized by Coke received more specific delineation by Blackstone in 1765. The essence of the corporate form in Blackstone's terms and in English and American law rested upon five conditions: (Williston, page 117; Holdsworth, pages 390-1)

(1) To have perpetual succession.

(2) To sue or be sued.

** In contrast to the corporation sole existent when corporate rights were held by an individual, such as a church officer. (J. S. Davis, I, pages 75f)

(3) To purchase lands and hold them in succession.

(4) To have a common seal.

(5) To make by-laws or private statutes.*

The transfer of the corporate form to the colonial colleges carried with it these essentials of corporate life; but the environment proved a different one, socially and politically. The democratic, individualistic sentiments of the colonists, escaping as they had from repression in England, eroded quickly the dictum of Blackstone that "the King's consent is absolutely necessary for the creation of any corporation." (Brody, page 16) By the end of the 18th century in America, it was considered generally that any association of persons seeking to carry out a socially accepted purpose had the right to incorporation. Concomitantly, the Puritan settlers maintained a legal separation of Church and State which led to the use of the corporate form for the civil activities (in contrast to theological) of parishes or congregations. (Brody, page 16) The transfer, therefore, permitted the use of precedents in the English colleges, especially those of Cambridge, as they were chartered by Crown and

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* "It was settled before the sixteenth century and recognized in that century that any of the powers belonging to a corporation could be exercised by a majority of the corporators -- a principle which an Act of 1541-2 enforced on corporations notwithstanding any directions to the contrary contained in their foundation statutes. Similarly the medieval rule that an act of the corporation must be under the corporation seal, and the medieval exceptions to that rule were recognized and reasserted; and it was laid down at the end of the seventeenth century that the seal must be affixed by the proper officer, and that the seal was not needed for acts which, being matters of record, the corporation was estopped from denying." (Holdsworth, page 391)

Parliament but led to an adjustment of the corporate form more in keeping with the new society and with the influences which led to external boards of governors or trustees as recipients of corporate rights.*

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* Anticipating the Dartmouth College Case decision supporting the inviolability of a charter, the question does arise regarding the role of the King and of Parliament in the control of chartered corporations. R. M. Denham presents a careful analysis of English precedents in this regard. He notes the sovereignty of the King as the original holder of the land, "the proprietor of all lands in the kingdom and the fountain from whence all franchises were derived." (Page 209) Thus, rights to land rested originally upon action of the King. Similarly, according to Denham, the King began to grant intangible franchises among which were corporate charters. However, in terms of English law and practice, both feudal land grants and later corporate franchises by the King were "irrevocable without a sufficient cause shown." The Crown could not arbitrarily dissolve a corporation or alter a charter. By the seventeenth century, it was the Parliament, "as the voice of the people" that held final sovereignty and that could dissolve corporations. It held "boundless power." Such were the views of early authorities, according to Denham; and he quotes Blackstone as saying, "A corporation may be dissolved by Parliament, which is boundless in its operation." (Page 211)

PART II CORPORATE BASIS FOR AMERICAN COLLEGES AND UNIVERSITIES

In the broad panorama of the history of western European culture since the Dark Ages, one of the pervasive features has been the slow but persistent augmentation of the rights of individuals. Over these centuries the absolute authority of the Church and Pope slowly gave way to judgments based upon man's own knowledge and values. Concurrently the omnipotence of monarchs languished in the contest with legislatures and other forms of government representing the authority of a more popular constituency. Sovereignty, in this sense, shifted from a divine legitimization supported by a religious-military oligarchy to a popular sanction-based, ostensibly at least, upon the will of the people. Within this general evolution, especially in the times since Lockean philosophy and its counterpart continental idealism sounded out for the rights of man, the criteria for appropriate action in the management of society's affairs have reflected a contrariety between the good of the society (usually equated with the power of the state as a political unity) and the importance of the individual. The dogma of the American Revolution emerged from and gave support to a society in which individual effort predominated. In this century the predominant social and economic ideals have accorded with an urbanized, industrialized era in which of necessity individual actions require increasing regulation and control for the common good.

The corporate form as the basis for legitimization of cooperative, private enterprise as we think of it today served the English kings as a legal instrument by means of which they maintained their sovereignty. As

we have noted previously, historical evidence supports, especially during the reigns of the Tudors, the use of the corporation for the conduct of affairs deemed important for the good of the kingdom yet beyond the scope of the immediate officialdom. Under these circumstances, the state, first as the Crown itself and later as Parliament, retained control in the sense that authority delegated could be withdrawn; yet, as common law developed, certain legal rights and privileges accrued which made the corporation a stable form of association.*

As one reviews this evolution, it appears also that in the seventeenth and eighteenth centuries the corporate form harmonized equally well with the changing conceptions of sovereignty which turned away from the divinity of Church and King. The Lockean conception of man's natural rights supported the democratic postulates of England after the crowning of William and Mary in 1689. In these terms the corporation in America ultimately attained a status associated with that of individual citizens upon whose consent a government rested and who had equal rights in law. As a fictitious or juridicial person the corporation proved a viable mechanism for the distribution of societal tasks or roles in a manner which recognized the sovereignty of government on the one hand and yet protected the rights of the corporate members on the other. If government owed its legitimacy

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* A chronology which can be initiated by a reading of the famous History of English Law Before the Time of Edward I by Pollock and Maitland. However, no historical account of the corporation as such was uncovered in the investigations for this analysis. Alan Karp has begun such a history for the universities, relating the corporate form in England to its origins in Roman Law, as a doctoral dissertation at Columbia University.

to the consent of those governed, then it in turn well could be held obligated to a contractual obligation in its relations with individuals. And, since bodies of citizens as an association had no legal rights as such, they could achieve by a corporation judicial rights similar to those of real individuals, including the holding and managing of property and the maintaining of the association over time as individual members came and left.

From the early democratic impulses in England, the attitudes and practices of the colonies moved the American society away from the conception of the state as the holder of final sovereignty. Indigenous conditions by the time of the Revolution gave the Lockean concepts of legitimacy based on natural rights a good fit with the individualistic pretensions on this side of the Atlantic Ocean. The rights of government to control chartered organizations by the early nineteenth century became mixed in with protections afforded individuals, especially in questions related to the holding of property. Thus, until in more recent years a broadened concept of the public interest has rationalized and supported a trend away from this individualism, corporations have enjoyed a high degree of autonomy in the management of their affairs. American colleges and universities have shared this independence. It was not without significance that the major court decision which supported corporate autonomy and the rights of property had to do with a college and came as a response to the arguments in the Dartmouth College Case.

The purpose of this second part is to examine the evolution of the government of the initial colleges as corporations within the context of

the corporate form as a more general societal phenomenon. To this end four sections follow. The first will isolate for purposes of this examination the nature of the charters of the colleges established prior to the Revolution, not as a history of their organizations but as a setting for a review of their corporate nature.* The second and third will focus upon the early evolution of the corporate form itself and the nature of the contract idea which served as the basis for Marshall's upholding of the rights of the original trustees of Dartmouth College. The final section will deal with developments related to the Dartmouth College Case and the subsequent distinction between private and public corporations for colleges and universities.

ESTABLISHMENT OF THE EARLY COLLEGES

The college system came quickly to the colonies. Within two decades of that bleak, almost wintry autumn day when the first settlers scrambled up the New England shores, students were in attendance at Harvard College. Other colleges followed, although at more temperate pace, so that by the Revolution nine were in existence. Frederick Rudolph estimates that about 700 were at least founded by 1860 of which 250 survived (Page 47),

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* This history has been written, although to date it is unpublished, by Professor W. H. Cowley of Stanford University in his study Professors, Presidents, and Trustees (1964) which he currently is revising. Historian Jurgen Herbst of the University of Wisconsin has underway an intensive analysis of the organizational nature of Yale, William and Mary, and other colonial colleges.

evidence of an extraordinary commitment to learning in a then very rudimentary nation whose people outside of a few major centers faced immense and mundane tasks related to making a living and even surviving in a land still being settled. It presaged the ultimate formation of the massive system of higher education existent today.

The relationship with government which became manifest during this educational expansion has proven unique in western society and particularly appropriate to that combination of a societal responsiveness and an institutional autonomy which has supported the vitality of American higher education well into this century. This relationship sprouted from the transplant to an American soil of the organizational form of the colleges in the two English universities. The corporate basis for these English antecedents proferred a societal mechanism appropriate to the colonial conceptions of political liberty. It fitted also the legal separation between state and church fundamental to the Puritans' conception of ecclesiastical associations stemming from the experiences in England which drove them to the American shores. Thus, one finds that when they founded Harvard in the late 1630s the leaders of the Massachusetts colony used a combination of precedents from their own experiences in English universities and of arrangements then being established to handle the managerial aspects of the local parishes of their Church. (Brody, pages 13-16)

In the formation of the early colleges two organizational influences associated with European institutions jointly served to shape the form of the government of higher education in this country. For this study, the focus is on the corporate nature of the colleges and the unique contribution of this form in providing, along with other corporate societies,

an effective relationship with the state governments. Concurrently, however, a governing board of external members became the recipient of the corporate grant. It becomes appropriate, therefore, before examining the governmental structures of the early colleges to explore briefly the origins of the lay governing board, which constituted a break with English traditions wherein the academics held the corporate authority.

Historical precedents for the use of lay governing boards have medieval origins. It is true that the first major university center, that at Bologna, took form as an association or guild of students (in contrast to the organization of masters in Paris and the northern universities) who employed their teachers. In general, however, the universities of northern Italy "wherever their origin is distinctly traceable . . . are found to be due to the initiative of the city and its rulers," according to Rashdall. (II, page 59) Rashdall notes further that by the end of the thirteenth century "the professors are largely supported by the municipality and are increasingly subject to civic control and supervision." Initially, this was carried out by means of committees or boards representing the municipalities formed to oversee the financial investment made in the universities. However, by the fourteenth and fifteenth centuries the Italian universities by and large had come more fully under the control of what Rashdall calls "state boards of _reformatores_ or _officiales_," as a corollary of the system of state-paid _salaria_. In other words, despite the student selection of the rectors, the professors looked to external authorities for their support and thus gave their allegiance to these external officials. (Rashdall, II, page 60)

In a form similar to universities in the Italian city states, the Calvinists in the early sixteenth century adopted the lay board of control as an appropriate mechanism for the direction of the academies at Geneva.* A few years later, the Dutch founded the University of Leyden under the control of a board of civic leaders. A similar plan for control characterized the Scottish universities of that same era and, in turn, the Protestant Trinity College in Dublin. Professor Cowley, who in his history of governing boards, notes that the founders of Trinity "looked to England . . . for their trusteeship plan and provided for two governing boards: a Board of Visitors and a Board of Fellows." . . . "In short," he comments, "academics 'owned' and managed Trinity much as did their counterparts in the colleges of Oxford and Cambridge. Calvinistic conceptions of polity, however, required that an external board of non-academics have surveillance over the internal board." (1964, Ch. 2, page 11)

Without a careful inspection not only of documents but of correspondence of the leaders in the founding of Harvard College and the second colonial college, William and Mary, a demonstration of any direct influence from these historical antecedents must remain conjectural. But the early New England colonists were Protestants and Calvinists. They faced essentially the same problems of enforcing religious orthodoxy that Protestants

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* However, evidence does not support a causal influence from the Italian universities to practice in Geneva. It seems more likely according to Karp (in correspondence with this author) that practice in Geneva grew out of the local situation, especially the resistance to Calvin's plans for a state controlled by the church. City magistrates apparently insisted upon a voice in overseeing the church and thus the Academy.

in Geneva and Dublin did. Although by no means committed to a state religion in the sense of England and the continental countries, they were determined to maintain adherence to the tenets of their faith. For the colleges, they achieved this religious conformity by maintaining lay rather than academic authority. Thus, it was the Overseers who controlled Harvard in its early years. Later the Corporation as the more immediate governing body also was to consist of nonteaching members. Yale began and continued with a lay board. At William and Mary where the ties between church and college were even more intimate, the immediate governing body of President and Masters constituted the corporation, yet remained in very significant ways subject to the lay Board of Visitors.*

Harvard

The precedents and practices of the English colleges, especially those at Cambridge, accompanied the colonists who founded Harvard in their move to a new homeland. They can be found in the name of Cambridge where Harvard now stands and in the college buildings which may have lacked stone

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* It must be recognized that in Virginia the Church of England dominated. This led to a different relationship. William and Mary was founded more closely in line with the corporate arrangements for the English colleges, as will be discussed later.
In assaying the founding form of the early colleges, it must be remembered that the colonies lacked, as Professor Jurgen Herbst has commented (in correspondence with the author), "English-style 'fellows'" to whom the affairs of the institutions could have been entrusted. Over and above the desire to assure conformity with prevailing religious orthodoxy, the founders (whether the legislature as the General Court for Harvard or a group of individuals as the ministers at Yale) had no scholars or teachers so established that the management of the college could be entrusted to them.

and ivy but served as living halls and provided a way of life and study reflective of the Oxbridge environment. What else could have emerged? John Harvard, whose benefaction had much to do with its foundation, had attended the Puritan Emmanuel College at Cambridge. Both the second head and first President, Henry Dunster, and his successor, Charles Chauncy, attended colleges at that University. (Morison, 1935, pages 89ff) An estimated 130 university men emigrated to New England prior to 1646, 100 of whom had studied at Cambridge. (Morison, 1935, pages 359-61) The pivotal 1650 charter for Harvard which established its permanent organization culminated Dunster's efforts to achieve arrangements more closely associated with English practice. Similarly the curriculum offered the ancient languages and humanistic studies derived directly from this prior experience of the early colonists in England.

Yet, as one might well expect, precedents from a distant even though culturally similar society did not engender an identical reproduction in a new society set in a totally different environment and facing very different challenges for survival. In the initial arrangements of 1636 and more formal provisions six years later, colonial leaders recognized that they must provide for the direction and control of their new school in a manner not possible by the assignment of corporate rights to the teaching fellows as in England. Indeed the colony lacked a body of teaching fellows to whom they could turn. They set up instead a committee or board of magistrates and ministers, including the Governor and his deputy, to represent state and church in overseeing the internal affairs of the

"colledge at Newetowne."* (Morison, 1935, pages 325-6)

The original act establishing Harvard was essentially an agreement on the part of the colonial government to support the school. (A. M. Davis, page 23) More specific arrangements followed in the next year, but the act establishing a formal organization was not passed by the General Court of the colony until 1642. At that time, the Court authorized and empowered a Board of Overseers to "dispose, order, and manage to the use and behoof of said College, and the members thereof, all gifts, legacies, bequeaths, revenues, lands, and donations, as either have been, are, or shall be conferred, bestowed, or any ways shall fall, or come, to the said College." (Quincy, I, page 588) As Harvard became more firmly established during the 1640s, President Dunster pressed for a clearer corporate status similar to that of the English colleges. This he achieved when the General Court issued in 1650 a corporate charter.** By this second act, the President and Fellows received authority as "one body politic and corporate in law" with the right of cooptation to serve as the corporation for the College. (A. M. Davis, page 18) The Board of

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* "Magistrates" were the "Assistants" of the Bay Colony elected annually by the freemen (colonists recognized as citizens) under the Royal Charter of 1629. Until 1851, the head of the government or his deputy presided at meetings of the Overseers.

** An act subject to considerable legal question since this power resided in the Crown and had not been delegated to a colonial legislature. It must be remembered that at that time Massachusetts itself existed not as a Crown colony but as a corporation under charter from the Crown. Clearly, no chartered company, whatever the form of its internal organization, could charter another society within itself.

Overseers retained its position, holding the power of consent to all statutes, appointments, and fellowship elections on the part of the Corporation.* Unlike English precedent or that of Trinity College in Dublin the charter contained no specific provision for visitation.** Rather, the overseers were confirmed in this 1650 action as a second governing board. Initiative lay with the Corporation and consent with the Overseers, a situation natural enough when one recognizes the relative youth of the five fellows who averaged about twenty-four years of age and of President Dunster who had just turned forty. (Morison, 1936, Part 1, pages 10-11)***

Residual to the 1650 charter two issues came to the fore. One, which occupied the last half of the century, had to do with the legality of the charter itself, a question evoked directly in 1684 when the original Crown charter under which the colony had functioned was rescinded. Following its replacement in 1691 by a new charter and a royal governor, a number of proposals for the management of the College were made, but

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* An action apparently not unrelated to the fact that members of the Corporation were relatively young and thus inexperienced in the affairs of the colony and to the need for maintaining some religious supervision in line with Puritan beliefs in the rightness of their faith.

** A condition possible without threatening the religious orthodoxy of the institution because both college and the government were dominated by the Puritan oligarchy which controlled the colony.

*** The Corporation was in name and fact one body in law with the right to acquire property and receive donations, make and appoint a common seal, remove and choose officers and servants of the College, make orders and by-laws, and elect a new President and Fellows (perpetual succession). (Morison, 1936, Part I, pages 6-7)

none received formal authorization. Meanwhile, the College was maintained by ad hoc arrangements during the presidency of Increase Mather. Finally, in 1707 the colonial legislature with consent of the Governor voted a measure which declared that the Charter of 1650 "had not been repealed or nulled."* (A. M. Davis, page 29)

The other residual issue had to do with the constituency of the Corporation as the immediate governing body. Was it to be, as apparently President Dunster intended, a body composed of the teaching fellows, similar to the government of the English Colleges, or was it to be composed of nonacademic members? A final settlement of this issue did not come until 1825 when a definitive decision established the corporation as a board composed of lay (non-academic) persons. Practice during the intervening period, however, supported a mixed body of both academic and non-academic members. A good part of the reason for this derived from the rudimentary nature of the College itself in the sense that it never did employ during those years a sufficient number of tutors or other academics to staff the Corporation. Even those so employed, with the exception of two professorships established during the eighteenth century, were both very young and inexperienced in the affairs of education. In fact, until

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* The efforts to obtain Royal sanction, especially by Increase Mather, and the various charters proposed are discussed by Josiah Quincy (The History of Harvard University, 1860), Morison (Harvard in the Seventeenth Century, 1936) and Andrew M. Davis (Corporations in the Days of the Colony, 1894). Morison suggests that the final decision to retain the 1650 charter without the King's consent grew out of a "horse trade" in which the Governor concurred in the propriety of the old charter and the House of Deputies withdrew objections to the selection of John Leverett as President of the College. (1936, II, page 555) As will be referred to later, this situation evidences the intimate relationship between the College and the government of the Colony.

well into the eighteenth century it proved inevitable that the President and Overseers actively governed the institution. (Morison, 1936, Part I, page 15) After the resumption of the 1650 Charter in 1707 it became customary to appoint as tutors men who were not chosen as Fellows, so that the original intention, if in fact it were intended, of a board in the English tradition, was eroded further. The majority of the Corporation in the eighteenth century were ministers from Boston and neighboring towns. (Morison, 1936, Part I, page 21) The clergymen gave way in the nineteenth century to lawyers and jurists, physicians, and financial and business leaders. In this process the Overseers became what Morison has tagged as "a sort of academic House of Lords." The dispute, as such it became through the instrumentality of rebellious teachers from time to time, ended with the 1825 act of the Overseers which read in part "that it does not appear to this board that the resident instructors of Harvard University have any exclusive right to be chosen members of the Corporation." (Quincy, II, page 342)*

William and Mary

Responding to a petition from the colonial legislature, supported by the leading gentry of the colony and presented to Queen Mary in 1691, the English Crown two years later chartered the College of William and Mary. The establishment of the College conformed to English precedents in its

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* In his history of Harvard, Josiah Quincy sought to establish a distinction between what he called "Fellow of the House or College" and "Fellow of the Corporation." (I, page 278)

general form, but in practice its government responded to local conditions which led to a quite different set of relationships. A major divergence from English traditions proved necessary at the outset. Lacking men of letters who might have constituted a group of masters qualified to handle the affairs of the College, the founders provided in the original charter for a board of eighteen Visitors and Governors empowered to manage the affairs of the institution and holds its property until, as took place in 1729, the corporate powers could be turned over to "the President and Masters, or Professors" as a "body politic and incorporate in deed and name." (Kirkpatrick, page 96).

The 1729 transfer did establish in form at least a reasonable replication of the English system. At that time the two surviving members of the eighteen original trustees made the formal transfer of corporate power to the President and Masters identified as the Society. The Society received the power to hold and manage the property and revenues granted to the College. Furthermore it was entitled also to elect a burgess to the Virginia legislature and to act as the provincial office of surveyor general (a source of revenue to the College). A newly constituted board of Visitors retained the prerogatives of the original trustees to name a Chancellor to represent the institution to the Crown* and to elect annually a Rector as its head.

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* "Usually either the Bishop of London or Archbishop of Canterbury was prepared to plead the case of the College before the Crown, if necessary, and mediated serious disputes that plagued the Visitors and professors." The term of the Chancellor was set at seven years. (Thomson, page 188)

However, at this point differences with the English model became manifest. In the first place the College was a unique institution, composed of four different schools rather than a unified academic unit.* The Visitors, rather than the Society, held the power to select the masters or professors as well as to choose their own successors. Further, they could enact "statutes which delineated the structure of the institution and embodied the rules by which it was to be operated." (Thomson, page 188) The President in a real way stood in between the Visitors and the professors in that he alone could not make important decisions. In the words of Historian John E. Kirkpatrick, "there was no provision in the charter or statutes for anything more than a formal presidency, since the incumbent held no vote over the decisions of the masters who were life members of the corporation." (Page 101) And while the faculty (designated as the "six Masters") received the corporate rights to sue and be sued, to hold a common seal, and to hold and manage the properties and revenues of the College, "they were nonetheless subjected to the constant supervision of the lay Visitors." Unlike their English counterparts the Visitors "were omnipresent figures who oversaw collegiate affairs in considerable detail." (Thomson, pages 188-9)

The inadequacies of the charter and close proximity to the daily affairs of the College on the part of the Visitors provided as might be expected, fertile soil for the cultivation of conflicts between the two governing bodies. There were acerbated, as so frequently was the case in

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* An Indian school, a grammar school, a collegiate school, and a divinity school.

the early colleges, by disputes reflective of religious differences and the ambitions and personalities of members of both the Society and the Visitors. The eighteenth century for the College proved an era of turmoil during which the Visitors attempted to enforce their supervision and control and the professors resisted and submitted appeals to the Chancellor in England. To the extent that the Chancellor responded he supported essentially the corporate rights of the faculty; but this external influence supporting the conceptions of the charter terminated with the Revolution. By the 1780s the Visitors had asserted successfully a powerful role in the management of the College, illustrated by a 1778 statute which successfully subjected the educational program to the control of the president and professors and a committee of six Visitors, voting together. As Robert Polk Thomson summarizes the post-Revolutionary changes, "in the new university the faculty was stripped of all the independence which it had clung to so tenaciously during the colonial years." (Page 211) And William and Mary moved, as did Harvard, under the control of a board of nonacademic governors.

Yale

When the founders of Yale College sought authorization from the colonial legislature of Connecticut, they did not propose the two-board plan of Harvard and apparently knew little if anything about events in Virginia. Both the original statute of 1701 providing for a "collegiate school" and the act of formal incorporation in 1745 for the "more full and compleat establishment of Yale College" as "an incorporate society or body corporate and politick, the President and Fellows of Yale College,"

contained provision for a single board of nonacademic governors. (Yale Corporation, pages 17-18) The initial proposal for a "collegiate school" rather than a college enabled the founders to avoid the necessity of forwarding their charter request to London for Crown approval and thus, since they did not intend to do this, introduced a legal uncertainty into the new enterprise. (J. S. Davis, page 21)

The influence of Harvard was present, however. Nine of the ten founders of Yale were graduates of the older college in Cambridge. Also, the Yale founders maintained a regular correspondence with Increase Mather, then President of Harvard; and they used the services of Boston lawyers in the preparation of the legislation. But the Harvard influence had a reverse twist to it. Like their communicant, Mather, the founders believed in and sought for religious orthodoxy. Eyeing the emergency in Cambridge of Unitarian and Deistic deviations from the established theology, they looked not to the 1650 Harvard charter but to the proposals of Mather in the 1690s which in effect would have established for Harvard a single board dominated by clergymen of the orthodox faith. Thus, the Yale founders in their petition for a single board of nonacademic members hoped to maintain sectarian control over the new institution. This intent resulted also in the corporate grant to a single, self-perpetuating board without formal provision for visitation.* (Oviatt, pages 137-156; Quincy, pages 68-9)

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* A question which did arise within two decades of the 1745 charter when a bill was introduced into the legislature in 1763 calling for a visitation.

However, in terms of the principle of corporate form, Yale did follow Harvard and English colleges. The influence of these precedents can be seen in the writing of the academic laws by President Clap at the time of the 1745 charter. (Baldwin, page 54) It is clear in the wording of the 1745 charter itself, which grants the corporate powers associated with the holding of property, receiving of gifts, grants, bequests and donations, the adopting of a common seal, the holding of the right of cooptation and of the authority to select the president and officers of the institution, the making of rules and regulations to direct internal affairs, and the conferring of degrees. (Yale Corporation, pages 14-18)

For American higher education, the Yale petitioners for the collegiate school and President Clap by his 1745 charter laid out a system of government and control ultimately to become the customary one for first private and later public colleges and universities. What is not certain is the extent to which subsequent founders looked to Yale for a pattern or the extent to which similar arrangements simply reflected similar circumstances. Some historians credit the College of New Jersey (later Princeton) as the more influential college in this regard. We do know, of course, that as a center for theological orthodoxy Yale was the first college to send out alumni in any kind of numbers into the frontiers of the expanding nation. As ministers and educated men these alumni participated in the founding of other colleges which sprouted in large numbers after 1800. Yet, there can be no question, as Professor Jurgen Herbst insightfully suggests, that other considerations were operative.* The absence of wealthy founders

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* In a letter to the author.

who could have endowed a group of fellows or masters and the absence likewise of masters and fellows ready to be endowed necessitated arrangements different from those of England. We do know, also, that the early settlers were familiar with the practice of using boards of trustees. Whatever the reasons, the practice of forming by corporate charters non-teaching, single governing boards, without as a general rule visitors, to found and to manage the colleges prevailed. Whatever the reason, the founders of the early colleges, with the occasional use of visitors, established by corporate charter single boards of nonacademic members holding the power of cooptation to found and to manage their proposed institutions. (Schmidt, page 9)

Other Colonial Colleges

Of the six other colonial colleges founded during the eighteenth century only one -- the College of Rhode Island (later Brown) -- failed to adhere to the pattern of Yale. None looked to the English tradition of constituting the corporation from members of the teaching staff. Yet all did turn to colonial legislatures, Royal governors, or the Crown itself for formal authorization by means of charters. All took the form of corporations separate from government even though support from the sale of public lands and taxes and membership on boards of officers of the colonial governments blurred this independent status to a large extent.* Also, it should be noted, legislatures exhibited a very evident readiness to intrude into

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* Exceptions were Rhode Island which included no public officers on its board and received no public funding, and Princeton and Rutgers which obtained no public financial support.

the internal affairs of these early colleges.

While the College of Rhode Island in its 1764 charter might be viewed as having had two boards, it "in no way resembled those of Harvard and William and Mary. . . . In fact, the charter issued by the Governor and General Assembly of the colony, did not actually provide for two boards, but, instead, for two branches of the same board." (Cowley, 1964, Ch.3, page 6) With this possible exception, founders of the other colonial colleges petitioned for, and received, charters which contained provision for single, non-teaching boards of governors, the members of which along with their appointed president assumed full responsibility for the welfare of the school.

The College of New Jersey (later Princeton) derived its origins from the impact of that wave of religious revivalism known as the Great Awakening. Its founders, the New Light theologians, in their revolt against the conservative Presbyterian Synod in 1753 obtained a charter for a college which, in addition to providing a general educational opportunity, would educate ministers of their theological persuasion. To this end they sought to keep control of the college by means of a board composed of members of their faith. A second charter issued two years later, however, modified the original grant by broadening the board of twelve members to twenty-three, including on it, among others, the Governor and four members of the colonial Council. (Wertenberger, pages 15-27)*

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* Both Princeton (as the College of New Jersey) and Rutgers (as Queen's College) received charters from the Crown granted through the Royal Governors. (Schmidt, page 9) In these arrangements, they followed the Yale pattern of self-perpetuating boards.

Both the colleges in Philadelphia (later the University of Pennsylvania) and in New York (Kings College, later Columbia) owed their existence to the efforts of leading citizens representative of several denominations, although the religious influence was felt more strongly at Columbia. The Philadelphia Academy (established in 1740 and named a College in 1755) experienced a number of changes in its charter, resulting from external political influences and personal rivalries, but retained the essence of its original incorporation as it was formally granted by the Governor of the Colony with Crown approval in 1753. It provided for corporate control by a nonacademic Board of Trustees with twenty-four members, to which was added in 1791 (when it became the University of Pennsylvania) the Governor of the State as its President. In traditional corporate style that charter read, in part, that the board members "shall be and are hereby made and instituted a corporation and body politic in law and in fact, to have continuance forever by the aforesaid name, style and title of the Trustees of the University of Pennsylvania." (Cheney, pages 30-45, 121-5, 149-65)

King's College (Columbia) received its formal authorization from King George II in 1754 by means of letters patent as "a Body Corporate and Politick, in deed, fact, and name" granted to the Governors of the College" which "ordained" that, certain designated lands having been first conveyed and assured to the corporation, "there be erected and made on the said Lands a College. . . . known by the name of King's College, for the instruction and Education of Youth in the Learned Languages, and Liberal Arts and Sciences." (Columbia College, 1854, page 5) The King's grant, however, followed prior actions by the colonial assembly extending over a period

of several years. (Columbia University, 1904, Ch. 1) The period of gestation extended from 1751 when monies from lotteries were awarded to an original body of trustees established by the legislature. It proved a period of religious controversy over the control of the institution, leading to the creation of a board representing ministers and laymen from several denominations, although one in which the Episcopalians achieved the dominating influence. The President of the College was to be a "member of and in communion with the Church of England."* (Columbia College, 1854, page 5)

Both Rutgers and Dartmouth were founded in 1766 and 1769, respectively, with single boards of nonacademic members, each including men of various churches. Known originally as Queens College, ~~the~~ Rutgers resulted from a division in the Reformed Dutch Church. Its charter which was granted by the governor on authority from the Crown provided for a governing board of forty-one members, four of whom were officials in the colonial government, thirteen ministers, and twenty-four laymen lacking affiliation

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* "Columbia University was established as King's College in 1754 under a charter granted by George II of England. The charter provided for the establishment and governance of the College. There are two sets of governors or trustees. The so-called Lottery Trustees who received money raised by lottery for the purpose of establishing a college in the Province of New York and who had in their power the selection of the site for the College. Both the Lottery Trustees and the various lotteries were authorized by the Provincial Assembly. The offer of a land grant from Trinity Church corporation no doubt influenced the selection of New York as the location for the College. Upon the granting of the Charter in 1754 which provided, among many other things, for a specific Board of Governors for the College, the Lottery Trustees turned over the portion of the money raised which was allotted to the College and in a few years disbanded." (Alice H. Bonnell, Curator, Columbia University, in letter to author dated June 6, 1972.)

with the founding church. Dartmouth probably had the most unique origins of the nine colleges in that its founding impetus rested almost entirely in the vision and vigorous, effective commitment of one man, Eleazer Wheelock, who obtained support from the Royal Governor of New Hampshire, John Wentworth. Intended originally as a Christian school for Indians of the New England frontier, it opened in the form and fact as a college. The royal charter issued by the Governor of New Hampshire named a board of twelve trustees with four members from the colonial government which was authorized "to appoint officers, including the filling of vacancies within their own body, to provide instruction and to award any of the degrees commonly granted by the universities of Great Britain." (Richardson, page 89)

Dartmouth was the last of the colonial colleges, themselves a significant commentary upon the nature of this early society and its commitment to education. All were formed as non-governmental institutions.* As a rule, they were organized on the initiative of private groups rather than colonial legislatures, the exceptions being Harvard and William and Mary.**

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* Of special interest in this connection, as mentioned before, is the fact that for none of the colonial colleges other than William and Mary and Harvard was provision made for visitation, either by the Crown or by the colonial government. The founding of Dartmouth has a special interest for this account because of the significance later of the Dartmouth College Case decision. We will return to this question. A detailed account of the founding, however, can be found in John M. Shirley, The Dartmouth College Causes and the Supreme Court of the United States. See also the account of Jere R. Daniell in the Dartmouth Alumni Magazine of December 1969.

** Harvard and William and Mary were founded by the initiative of colonial legislatures, the former established by the General Court of the Massachusetts colony and the latter on petition from the legislature to the Crown.

Yet, any review of their establishment must give attention to the public nature of their existence. They indeed were expected to perform a function deemed in the public interest, even though this interest had strong sectarian overtones. The colleges commonly were viewed -- with suspicion or pride as the case might be -- as institutions serving the whole of society. The distinction between private and public colleges to take form after the Dartmouth College Case did not exist in the colonial era.

Only three institutions, as noted previously, failed to receive public support such as grants of land, commitment of certain tax revenue, or direct allocations. William and Mary, for example, received along with its charter 2,000 pounds and 20,000 acres of land from the Crown and a tax of "one penny on every pound of tobacco exported from Maryland and Virginia, together with all fees and profits arising from the office of surveyor-general, which were to be controlled by the president and faculty of the College." (Adams, page 15) Yale opened with a commitment from the Assembly for modest financial support on a continuing basis (Yale Corporation, page 18), a contribution stopped in 1755 during the controversy which led to the visitation opposed by President Clap. Harvard, similarly, depended in part upon tax levies and other revenue from Massachusetts and, to some extent at first, other New England colonies. (Morison, 1936, II, page 389) Similarly, five of the colleges opened with public officers, including the governors, on their boards. Yale and Pennsylvania added them later. Only Brown and William and Mary continued without this type of public representation, but each college had close relationships with the dominant church of its colony which served to engender support and to maintain effective relationships on matters of the educational programs.

Corporate Nature of the Early Colleges

The corporate nature of the early colleges did not create by itself the condition of autonomy associated with later American institutions of higher education. This condition arose in the aftermath of the Dartmouth College Case, based upon a definition of publicness in terms of control rather than service. Yet, while clearly the colonial colleges performed a public service in the eyes of the citizens and governing officials, equally clearly they did not constitute an integral part of the organization of government. In this sense they were private, controlled by governing boards separate if not totally independent from the legislatures and governors.

Within this milieu, a curiously effective relationship evolved by means of which a corporate autonomy did germinate even as the early colleges received the financial and other support from governmental sources. The explanation of this relationship, which to our contemporary view appears almost contradictory, lay in a kind of "interlocking directorate" situation within the colonies and the early states after the Revolution.* The men who governed the colleges also governed the colonies and their churches. Thus, they could insist, as they did especially in Virginia and in New England, upon religious orthodoxy yet have a college organization separate from civil government. They could obtain educational conformity in terms of the sectarian and moral values of the times while preserving an essentially corporate autonomy over internal affairs. The

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* Cheyney writes of the Philadelphia Academy, for example: "In 1750 the City Council, liberally inclined toward the Trustees of the Academy, since the two bodies were interlocking directorates, gave 200 pounds for the alteration of the New Building. . ." (Page 36)

first two centuries of this history proved a time in which the internal affairs of the colleges frequently became matters of active public interest. As might be expected, legislators voting financial support expected a degree of control. President Clap of Yale may have fought against a visitation; but, regardless of his efforts, later in the century the necessity of financial assistance led to bringing on to the governing board officers of the government. Both Harvard and William and Mary experienced more than a century of controversies in which their internal affairs were closely intermingled with legislative actions. Similar situations existed in all the colleges to a greater or lesser degree.*

Nonetheless, late in the eighteenth century intimations of the Marshall interpretation of the contract clause and with it the protection of private corporations did have an occasional expression. Three specific situations prior to 1800 offer some evidence that the "privacy" of the colleges could ultimately become an issue. In part, these came as reactions to efforts by colonial governments to gain a greater control over specific colleges. In each of the three, to be briefly reviewed in the following section, the idea of college charters as creating private institutions free from direct governmental control was to a degree recognized. At Yale, President Clap's cogent argument about the private founding of the College was aimed at preventing a legislative visitation. In the case

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* The details of the college-state-church relationships by means of which the oligarchies of each of the colonies maintained control and coordination over educational-political-religious affairs are portrayed well by Richard Hofstadter in his history of that era. (1968, pages 114-151)

of Bracken v. the Visitors at William and Mary a court refused at least to rule directly that the College was a public institution. And finally, following a decade of intrusion by the early state government, Pennsylvania was returned by legislative action to its original board of trustees. The argument of this analysis requires at least a brief examination of these three events as preludes to (although not precedents for) the Dartmouth College Case decision.

Antecedents for Corporate Autonomy

President Clap at Yale. The circumstances leading up to the proposed legislative visitation of Yale College in the 1760s evidence the frictions between other early colleges and their societal contemporaries which so frequently grew out of conflicts of personalities and religious convictions. President Clap governed Yale in a firm but abrasive manner, reflective of his strongly held, conservative Calvinist convictions which brought him into discord both with leaders of the colony and students at the College.* Attacks upon Clap's administration came from external and internal sources. The first impact was an action in 1755 discontinuing public financial support. By 1763 four appeals had been made to the legislature calling for an investigation of the affairs of the institution. The last of these took the form of a memorial signed by nine leading citizens urging a legislative visitation. (Trumbull, II, pages 327-28)

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* The religious conflict was that between the established clergy of the colony and the revivalist New Lights whose commitment to fundamental theology Clap supported. He openly joined their cause by establishing a collegiate congregation separate from the First Church of the town which was attended by the established, more moderate elements.

Apparently with support from external opponents of the President, students took issue with him not only by means of rhetoric but with physical violence which included an assault on his home. The President suffered injury from falling glass in the latter escapade, but more significantly by 1766 the College itself approached total collapse.

The controversy and the 1763 appeal of the nine memorialists set the stage for the first major plea for institutional autonomy. This came in the form of a vigorous and effective defense of the College by President Clap against a proposed legislative visitation.** The General Assembly, he contended according to the account of Yale Historian Trumbull, "had the same authority over the college and all the persons and estates belonging to it which they had over all the other persons and estates in the colony." (II, page 329) But, he argued, the legislature was not to be considered as founder or visitor in the sense of the Common Law. The first trustees were the founders in his argument, not the legislators; and in the English law, as he pursued his logic, it is the founders and their heirs to whom the law gives the right of visitation. To intrude into the internal affairs of the College, in this line of reasoning, would be to take the government out of the hands to whom it was originally trusted and thus contrary to the charter. (Trumbull, II, pages 331-34)

As might be expected, the circumstances of the case did not substantiate

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** The issue at stake, however, related to visitation and thus control by the legislature. The idea of a contractual nature of the charter, later to be the critical element in the Dartmouth College Case, was not brought in to Clap's arguments.

the kind of neat defense of the College's autonomy that the Trumbull history of the affair would seem to indicate. In the first place, while Clap won the day in 1763, he lost the cause three years later when, shortly after his death, a legislative committee did review the program and did make recommendations accepted by the legislature, an action constituting an implicit visitation if not an explicit one. Clap was forced to retire prior to his death. Finally, in the aftermath of the problems of the Clap administration, the dislocations of the Revolution, and need for financial support a compromise finally had to be worked out with the legislature under which the governor, lieutenant governor, and six state senators were added to the Yale board. For Yale, as for other early colleges, legislative intrusions and changes in charters constituted a regular condition of institution-government relationships.*

Yet, an issue basic to the nature of corporate autonomy did emerge from the controversy, an issue very closely related to the public nature of the College. President Clap strove hard to maintain a religious

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* Professor Cowley (1964, Ch. 4) and Professor Jurgen Herbst (1972), historian at the University of Wisconsin, both have reported on the early years of Yale in some detail. Professor Herbst's paper includes a very complete analysis of the case and reviews the legal aspects and English precedents pertinent to the Clap position. In this connection it must be remembered that Yale's Charter never received the authorization of the English Crown and, therefore, could hardly be considered a legitimate one in law. However, the colonists did not take this as a major problem, although it was recognized in discussions of the case.

Commenting on the 1766 visit, Clap's major opponent in the controversy, "wrote triumphantly of 'our gentle visitation of Yale College, in which we touched them so gently, that till some time after the Assembly, they never saw they were taken in, that we had made ourselves visitors, and subjected them to an annual visitation. . . .' " (Herbst, Ch. II, page 2)

fundamentalism. In doing so, he came hard up against the fact that other sects and religious affiliations had support in Connecticut. And if Yale were to serve as the only college in the colony receiving support from its taxes, it clearly could not serve the ends of one denomination in the view of Clap's opponents. Clap, on the other side, resisted stoutly on the basis of the privateness of the corporation against external intrusions into its religious requirements. The idea of public responsibility in the end carried the day so to speak, as ultimately confirmed in the charter change of 1792; but Clap's arguments stand in defense of the integrity of a corporation autonomous from visitation by the authorities of the state, and thus their control.

William and Mary Case. The question of the corporate autonomy of a college as a private institution did receive judicial review, however, in one case shortly after the Revolution. This grew out of the appeal in 1787 of one Reverend John Bracken who eight years previously had lost his position as a professor of humanities in the grammar school of William and Mary College. His petition contended that the College was a public corporation or quasi-public institution and as such had its acts subject to review by the State through its courts. The bases for this contention lay in the receipt by the College of public revenues, in its origin as a corporation chartered for a public purpose, in its right to a member in the colonial assembly, and in its control of the office of surveyor general. Counsel John Marshall (later Chief Justice of the Supreme Court) for the College stressed its nature as a private eleemosynary institution for which visitors had been appointed. To the extent that the conditions noted by his opponent represented matters of public concern he asserted that nevertheless they

did not make the corporation a public one. His response noted further that the charter had given the corporation power to direct and control the internal affairs of the College as its governors deemed fit and expedient.

In responding to the arguments of the Counsels the court did not take aposition of the public versus the private nature of the College, but rather the justices refused the writ of Bracken "on the merits of the case." The decision was brief, consisting of four lines. (Bartosic, pages 260-61; Brody, pages 22-24) Apparently some disagreement existed within the court which led to an avoidance of the critical issue of the case. In a negative way, however, the court at least did not formally support the contention of Bracken's counsel. For practical purposes the decision left the College, in the words of Brody, "a private institution secure in its property, powers, and franchises," (Page 24) until after the turn of the nineteenth century when it became a state institution.

Charter of the University of Pennsylvania. The third event before 1800 brought into dispute the question of a legislative unilateral alteration of a college charter, but the controversy did not reach the courts. The question of corporate autonomy did not prove a major issue, yet it stood at least implicitly as a significant consideration. The action itself arose out of the post-Revolution uncertainty regarding the status of corporations founded by colonial grants and political controversies broader than the institution itself. In 1779 the new legislature of Pennsylvania summarily altered the charter of the college in Philadelphia. (J. S. Davis, II, page 310)

The college had been established formally in 1753 in a charter issued by the colonial governor following "official approbation" by the English Crown for an "academy" in that city. Actually in the chronology of the founding, the charter gave a legal sanction to the action of its board of trustees who had opened classes two years previously. In this instance no question arose as to the priority of the founding. The Academy came into being as the result of the initiative and support of "twenty-four gentlemen of Philadelphia voluntarily united" as founders in 1749.* (Cheyney, page 28) It became a college in 1755, headed by a Provost, under a new charter incorporating the "Trustees of the College, Academy and Charitable School of Philadelphia in the Province of Pennsylvania." (Cheyney, page 43)

The 1779 revocation came as an action of the new State of Pennsylvania. A legislative statute of that year set up a new board of trustees, twenty-four in number, six of whom were major officers of the state government serving in an ex-officio capacity. The name was changed to the University of the State of Pennsylvania. The legislative action emanated from religious and political controversies within the State, intertwined with the attitudes and roles of the College trustees during the Revolutionary War. The controversy continued for a decade until in 1789 the conservatives

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* Historian Cheyney notes that in 1749 fifty or more citizens of Philadelphia pledged support for the then proposed academy "and twenty-four of the largest subscribers agreed to serve as Trustees for the proposed foundation." These Trustees then met November 13, 1749, signed the 'Constitutions' laid before them . . . elected Franklin their president and another of their number, William Coleman, treasurer." (Page 30)

gained a majority in the legislature and restored the institution to the original College board, leaving two governing groups and two institutions. In turn, these were merged two years later into the University of Pennsylvania, again with a board of twenty-four Trustees instituted as "a corporation and body politic in law and in fact, to have continuance forever . . ."* (Cheyney, page 165)

As at Yale and in other colonies and early states the basic constitutional question related to the autonomy of the college corporations never came sufficiently to the fore to bring on a definitive ruling. The Provost and Trustees of the original College did refuse to accept as legitimate the 1779 charter. But they carried on their fight in the political rather than the judicial realm so that no court review was ever made. Historian Cheyney implies that it was a matter for the legislature which "had simply directed its [the College's] use by one set of Trustees in place of another" since the operating nature of the institution remained unchanged in its essential nature. (Page 147) However, the case did come to the attention of a Committee of the Council of Censors (an elected group serving as a kind of supreme court to review the working of the new constitution of the State and with power to declare laws of the legislature unconstitutional). While the committee did express some doubts as to whether the 1779 law was not a "deviation from the constitution," the Council itself refused by a majority vote to declare the legislation

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* It should be noted that in New York a parallel situation developed when King's College was expropriated by the State of New York and assigned for three years to the Board of Regents of the State of New York, before becoming by a subsequent charter again private under the name of Columbia.

unconstitutional.* (Cheyney, page 148) The legal issue of corporate autonomy did come to the fore in a concurrent situation. The Pennsylvania legislature repealed in 1785 the 1782 charter of the Bank of North America. Attacking this repeal James Wilson, a leading attorney in Philadelphia, raised the question of a charter as a compact. In this latter case the basic nature of charters became a major focus in the controversy, although the point remained unsettled and the repealing act was left inoperative as "the bank advocates simply accepted a new charter." (J. S. Davis, II, Pages 310-13)

Within a few years after 1800, however, cases did enter the courts which raised the issue as to whether corporations were indeed private and the charter did serve as a contract as obligatory upon the governments as upon the corporations. But an issue had not arisen because in point of fact no such issue existed previously. Business corporations were few and almost universally related to the performance of clear public services, such as provision for roads and canals. An informal interlocking of college, church, and governmental offices by members of theological and economic oligarchies assured the control deemed necessary. Ultimately, however, as the population expanded and the society became more complex in its social, economic, and religious affairs, the homogeneity of religious and social values and interests began to break up. It was not sur-

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* Cheyney fails to consider the constitutional issues as to whether the state government could take over a chartered institution and as to whether the charters granted prior to the Revolution remained in force after it. These were primary in the Dartmouth College Case.

prising, therefore, that the later colleges in New York and Philadelphia emerged from the initiative of interdenominational groups and interested laymen rather than ministers. More than this, increasingly after the Revolution, the state legislatures became representatives of a variety of interests and a broader socio-economic spectrum which tended to separate them from the denominational associations of the colleges. Autonomy was indeed to become a matter of vital concern if the trustees were to maintain their educational purposes.

The corporate form already established by the early charters of the colleges provided the mechanism for this autonomy, but as a social structure it had still to gain the distinctive form which supported this condition. Prior to 1800 it was a structure in general use over a wide range of societal activities, from the early parishes of the Congregational churches in New England to private business enterprise, but its general use for the latter purpose was quite limited. Not until the early nineteenth century did entrepreneurs seeking profit turn to corporate association as an effective instrument for handling their enterprises. With a strong national government framed by the Constitution of 1789 which promised economic stability, general public confidence in future growth grew. In the glow of this confidence the economy of the nation expanded and "in the three decades after the Revolution, charters of incorporation issued forth in an ever accelerating rate from the chambers of state legislatures." (Oscar and Mary Handlin, page 103) Concurrently, the need for a clarification of government-corporate relationships became a matter of more general concern. As corporations, the college inevitably were to feel the effects of whatever policies and practices emerged.

As this analysis progresses, therefore, the corporate form for higher education requires the perspective of the broader view, that of the general nature of corporations. To this end the next section will review the evolution of corporations in terms of Lockean influences and legal precedents, leading up to the Dartmouth College Case.

EVOLUTION OF CORPORATE FORM IN THE EIGHTEENTH CENTURY

The evolution of corporations to their 20th century position as a major means for the distribution of the economic functions of society chronicles a complex legal history, well beyond the scope of this analysis. What comes under review here, however, is a limited aspect of this history concerned with the use of this form of organization for colleges and universities. In an extremely simplified summary, this can be highlighted in the following syllogism. Corporations in the tradition of English law based upon earlier conceptions became viewed legally as individuals. In the Lockean concept of government which meshed well with practice and desire in early America, government was a compact among individuals in which the latter enjoyed "inalienable" rights as free men. As legal individuals, corporations to a degree shared in these rights. In this sense the corporate status of the colleges ultimately gained for them a freedom from governmental control.

This section will review briefly the formation of the American corporate mode out of English precedents and the American social milieu. In the process it will suggest a catalytic influence by John Locke's ideas.

English Precedents

As discussed previously in this analysis, by the 18th century in England the corporation had become an accepted legal conception. Practice had established this type of organization as a distinctive social unit holding designated rights, both in connection with the universities and with philanthropic, municipal, and business enterprises in general. Concurrently, the English kings had exercised their prerogatives effectively, so that it was clear by time of colonial America that corporations existed upon the explicit authorization of the State. And "as the king's political capacities began to be separated from his person, it became possible to conceive of the state as the repository of civil power apart from a natural person." (Harbrecht and McCallin, page 2) Finally, legal precedent had confirmed the assumption of the corporation as a persona ficta, a legal individual distinct from the real persons who comprised its governing body. As a person in law, the corporation had certain rights associated with individual persons, a concept stated by Otto Gierke in his reference to a universitas or corporate body as "a living organism and a real person, with body and members and a will of its own." (Dewey, page 658) From these English precedents, there emerged a conception of corporations in this country which placed them in many respects alongside of the government as major holders of power in society.

But, while the English common law did serve "as a pattern for early American lawyers and judges" at the end of the 18th century, it served also as a starting point for the development of a more indigenous conceptualization in the United States. Within this American tradition incorporation has become so universal a privilege that in practice it exists almost as

a right; and "a whole collection of rules and principles evolved by the judiciary, in its attempt to insulate incorporated associations from legislative encroachment," has formulated a doctrine of corporate autonomy. (Robbins, page 166) In the English tradition, there were no immunities from government control and as a consequence no category of private corporation. Originally, what the King could give away he could take back. Thus, an examination of the English legal history reveals the public nature of corporations, not only as a concession from the state but as associations subject to legislative dissolution, for Parliament in time became the final authority.*

The question arises, therefore, as to why and how the American tradition nurtured a different quality to the character of these associations; namely, that of corporate autonomy which has so formidably undergirded

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* "Nowhere in the textbooks were corporations divided into 'public' and 'private.' On the contrary, Blackstone's classification, as an example, merely distinguished corporations aggregate from corporations sole; they were divided into lay and ecclesiastical, which in turn were then classified into civil and eleemosynary corporations." (Robbins, page 169)

In later practice the total power of the Crown over corporations underwent restrictions but the omnipotence of Parliament remained as the ultimate source of sovereignty and thus of control over corporations. Denham refers to the seventeenth century conflict between the King and Parliament "which finally resulted in the situation where the King still had the power and authority to grant the franchise to be a corporation, but any monopoly or other special privilege could only be had through an act of Parliament." He continues: "After a corporate franchise had once been granted in England there were only two ways in which the corporators could be dispossessed of it against their will: first, by an action in the nature of quo warranto brought for abuse or misuse of it, upon proof of which it could be taken from them by the King, and second, by an act of Parliament declaring it revoked." (Page 207)

Parliament began to assume its role as ultimate authority during the seventeenth and eighteenth centuries. After the Revolution of 1688 placing William and Mary on the throne, the Crown accepted the approval of the legislative body as necessary in grants of exclusive or monopoly privileges. (J. S. Davis, I, page 6)

the autonomy in turn of the colleges and universities. The answer lies in the different quality of American life: its distance, physically and politically, from the monarchy and the tradition of total authority in such a ruler by an inherent right of office -- divine or otherwise. It grasped, in the search for a rationalization of a different source for sovereignty, onto the principle of government based upon the will of the people. In brief, the leaders in the colonies and the American Revolution barred the principles of the English monarch from colonial shores but imported the ideas of an English philosopher, John Locke.

Lockean Influence

As a major philosopher of the period in western culture which has been designated as the Enlightenment and which was characterized by a general intellectual movement away from the authority of faith to one of rational thought for the determination of truth and reality, Locke contributed on several fronts. But his influence on American thought did have a great deal to do with his position on political and economic relationships. In this regard, Locke addressed himself to the question of the nature of governmental authority as it related to the rights of people. He theorized this authority as a condition of power based upon an understanding -- a compact -- among men which men could deny were a government to act in an arbitrary or tyrannical manner. The sense of this compact idea so important to early American thought is interpreted insightfully by Historian Carl Becker in his book, The Declaration of Independence (Chaps. II and III).

"The idea that secular political authority rested upon compact is not new," Becker postulates. "It could scarcely have been otherwise in that feudal age in which the mutual obligations of vassal and overlord were contractually conceived and defined. Vassals were often kings and kings often vassals. All were vassals of God who was Lord of lords and King of kings." (Page 31)

> Thus medieval philosophers had conceived of the authority of princes as resting upon a compact with their subjects, a compact on their part to rule righteously, failing which their subjects were absolved from allegiance; but this absolution was commonly thought to become operative only through the intervention of the Pope, who, as the Viceregent of God on earth, possessed by divine right authority over princes as well as over other men.

The erosion of Papal authority accompanied by a growing nationalism within Europe and an increasing materialism resting upon trade and commerce had changed this relationship by the 17th century. As Becker notes, Kings had "jostled the Pope out of his special seat and became coequals with him in God's favor." (Page 31) They ruled by divine right in their own position. As a result the people as vassals of the kings were shut off from an appeal to greater authority. Their obligations to the king were separated from their obligations to their church and to God.

Locke achieved prominence for his ideas about men and their governments in the late 17th century, just as the colonies were establishing the hallmarks of a civilization on the new continent, one populated in large part by those who sought to leave behind in Europe the authority of monarchs. What is more, Locke wrote his Two Treatises of Government in the aftermath of the English Revolution of 1868 which replaced an hereditary monarch with two chosen rulers, William and Mary. It was not

unexpected, therefore, that Locke should have searched for a new basis for sovereignty and to rationalize a new route by which mankind could relate to the authority of God and by means of which they could accept the authority of the political state. He found it in the idea of Nature and of natural law, a condition revealed by God as a part of His Eternal Law. By so doing, Locke constructed a philosophical defense for the growing rationalism of his time which had already begun to place heavy irons on the powers of kings in the political realm and which supported a growing awareness of the importance of the conditions of "this world" whereby the science of Newton combined with the economics of the market-place to orient man's search for the truth to man himself.

In its essence, Locke's "cumbersome not very cogent argument" in the last analysis rested upon common sense. "Since reason is the only sure guide which God has given to men, reason is the only foundation of just government." (Becker, page 71) Such a philosophy had a great appeal to Jefferson and his fellow Americans. Its influence upon early American thought was great indeed. (Curti, page 107)

In terms of the development of corporate law, the shift of sovereignty to "the people" and the basis for government in a "compact among men" proved an effective instrument for shaping the relationships of a democracy. That Locke's political philosophy included major economic components only gave greater support to the broadened interpretation of corporate rights. In Lockean terms the rights of the people had to do with their ability to hold property free from the intrusions of governments. Man's right to the fruit of his labor, the "goods of nature," derived also

from a comprehension of God through human rationality and what Locke called "the fundamental natural law of self-preservation." (Laslett, page 100)

Early American Corporations

It took the American Revolution to make explicit the terms of Lockean philosophy as principles for government, implicit in much of the actuality of colonial life. Their application to the nature of corporations followed in the early decades of the 19th century.

Nonetheless, the use of the corporate form during the colonial period had a general acceptance. To a large extent the founding and early settlement of the colonies grew more out of corporate enterprise than the efforts of individual adventurers. Until its revocation in 1684, for example, the charter for the government of Massachusetts was that granted to such a company. Similarly, it was a corporation to which Sir Walter Raleigh in 1587 entrusted the colonization of Virginia, and the colonies of Connecticut and Rhode Island were governed by a "Governor and Company," incorporated by charter from the English Crown. From these precedents and the experiences of the early settlers in their English homeland, this legal device served regularly for the formation of various kinds of associations. "As fast as the plantations [early colonial settlements] grew into communities," Joseph S. Davis comments in his history of the era, "their inhabitants naturally reproduced the corporate institutions with which they and their fathers had been familiar in the mother country." (I, page 4)

In general during this period the traditional English form of corporations prevailed. Groups of individuals were authorized by the Crown

either directly or through its representatives as governors of the colonies to establish associations.* These associations had certain characteristics related to the idea of a "fictitious personality" with the right to sue and be sued and to hold property. They held the right of perpetual succession and to use a "common seal."** They were by and large of a public nature, and only few business associations were formed until late in the eighteenth century. Andrew M. Davis in his historical review of early

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* In terms of this analysis it should be noted that the College of William and Mary "enjoys the distinction of being the only colonial college to be incorporated directly by royal charter." (J. S. Davis, I, page 45)

** "A corporation was then as now, a group of individuals authorized by law to act as a unit, though the term was extended to include corporations sole (as well as corporations aggregate), in which the corporation consisted of an individual and his successors. Much was said about its being a person, -- a fictitious person indeed, intangible, but no less real; and of its perpetuity, even "immortality," -- despite the mortality which overtook many, especially those for business purposes. Certain attributes, at all events, this person or unified group was recognized as possessing. It had a name distinct from the names of its members, in which it could sue and be sued. It had a common seal, peculiar to itself, which was required to evidence its acts. It had perpetual succession, that is, members might come and members might go, but it went on forever -- provided of course no internal or external forces terminated its existence: the death, insanity, withdrawal of old members and the entrance of new ones in no way affected its legal existence or constituted more than incidents in its legal life. It had the right of holding property as its own -- which was not the property of any of its members or all of them together -- and to dispose of such estate. Normally this property was not liable for obligations of members, and their private property was likewise not subject to be taken to pay debts of the corporation -- so distinct were the "persons" kept. Moreover, this body had a well-defined constitution, with power to regulate minor matters by by-laws not inconsistent with its basic act or the laws of the land. Such were the common characteristics of corporations, for whatever purpose they came into existence. Features peculiar to particular corporations were set forth in the document which normally evidenced its right to enjoy these high powers and privileges. All this was equally true in England and in America." (J. S. Davis, I, page 5)

Massachusetts statutes and charters describes the situation with the following comment: "It will be observed that each of these charters was granted to a society having for its purpose some public use, with the exception of the Long Wharf Company; and the purposes of that corporation even might be regarded as a matter of deep public import." (Page 33) They served to establish cities and towns, toll roads and canals, church parishes, and colleges and other philanthropic associations. It was not until the end of the colonial period that a number of "truly private corporations had been established." (J. S. Davis, I, page 4) And these engaged primarily in ecclesiastical, educational, and charitable activities.

In terms of the system of higher education which was to take its form in the nineteenth century, two aspects of this early history do warrant special attention. In the first place, colonial practice did establish firmly the necessity for a proper legitimization of corporations; they did not function as voluntary associations. "The English law of this period laid great stress upon the necessity for a proper legal foundation for the exercise of corporate rights." (J. S. Davis, I, page 5) Corporate status came as a privilege not as an inherent right. In England, the right went to corporate founders in the form of letters patent or charters from the Crown. This principle carried over to America. Yet in the course of the seventeenth and eighteenth centuries, as the colonial governments developed, grants from colonial proprietors, governors, or assemblies replaced the letters patent or Crown charters, usually on the basis of an explicit or implicit delegation from the sovereign. After the American Revolution, this right went to the state legislatures, and it was assumed that corporate status required their authorization.

In the second place and in contrast to English law, the legislatures did not obtain the ultimate power assumed by Parliament. During the colonial period the status of legislatures of necessity remained uncertain, fluctuating between the ultimate formal authority of the king and the freedom of action possible because of the sheer geographical distance from England. Thus, as Samuel Williston indicates, until 1800 no judicial precedent or law for corporations had evolved. (Pages 165-6) Thus, during the formative stage leading up to the Dartmouth College Case decision, no clear precedent for legislative powers over corporations was established. Although it was by no means unknown for colonial assemblies to intrude into corporate affairs, the new state legislatures were far from omnipotent. They were limited by the terms of the (then new and untested) state and federal constitutions. In terms of Lockean ideas, they were limited also "according to a view then widely prevalent among lawyers and judges, by implied restrictions on the legitimate scope of legislative action in a society based on private property." (Dodd, page 16)

Yet, conversely, it would be inaccurate to say that colonial governments hesitated to exercise an authority over corporate affairs. It appears fairly clear from the few studies of the period available that had the autonomy of a college as a private institution been raised in court the decision would have gone against the plaintiff. As late as 1812 and 1814, for example, the Overseers of Harvard College accepted without judicial protest changes in their charter by the Massachusetts legialature. (Quincy, II, page 301) J. S. Davis, in his history of eighteenth century business corporations, summarizes the situation with the following comment:

> It is fair to say . . . that at least to the end of the eighteenth century, corporate charters were, without any specific reservation, legally subject to repeal or alteration at the hands of the legislature. Such action, was, however, comparatively rare, and repeal, at least, was resorted to only under what seemed a high degree of provocation or else with the tacit consent of the corporation. (II, page 315)*

This, then, was the general situation at the end of the colonial era insofar as the autonomy of the college was concerned. English precedents gave to the colonies the corporate basis for the organization of associations -- at first related to local government and later extended to philanthropic, educational, and to a degree business enterprise -- which served

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* "Legislatures took substantial liberties with charters. In 1792, for instance, the General Court altered that of the Massachusetts Bank; and the corporation, while protesting, failed to appeal to the judiciary. Twenty years later, an attorney argued with success that 'the notion of a contract between the government and a corporation' was 'too fanciful to need any observation.' And in 1812, when the legislature changed the Harvard College charter without the consent of the corporation, the Board of Overseers acquiesced, voting it was 'not disposed to bring its rights to the test of judicial decision.'" (Oscar and Mary F. Handlin, pages 119-20)

the needs of the early society. During the colonial era no formalized legal practice evolved to alter the English common law. When the American Revolution succeeded, the Lockean spirit of individual freedom and the American resistance to authoritarian government gained expression in the federal and state constitutions. These constitutions in turn served as the basis for an interpretation of corporate status vis a vis public government different from English tradition. The state was not omnipotent in its own right; it was the creation of the people and obligated to respect their rights.* Out of this milieu there arose during the early decades of the nineteenth century the concept that private corporations had rights analogous to private citizens. The Dartmouth College Case decision established a legal foundation for the autonomy of private corporations and, in terms of higher education, the distinction between private and public associations.

DARTMOUTH COLLEGE CASE

The turn of the nineteenth century, therefore, marks the point at which there begins to appear in legal circles some support for the application of the compact idea to the nature of corporations. Prior to that time, it is difficult to find evidence which refutes the 1892 comment of a leading Massachusetts lawyer, James Sullivan; that "there is no lawyer in the State, who is disinterested, that will give it as his opinion,

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* In contrast to England where sovereignty was considered to rest with Parliament.

that the legislature has not a right to repeal the act of incorporation of that society [the Massachusetts Bank]." He continued later in the same commentary: "If it is not a grant of exclusive privilege, it is on the same footing of other legislative acts, such as incorporating towns and proprietors, which laws may be repealed at pleasure. Here was no contract between these people and the government, nor did the latter receive any reward or consideration for the grant." (J. S. Davis, II, page 314) Sullivan was attorney-general of the state; and shortly thereafter the legislature, while not repealing, did alter materially the bank's charter. However, for a decade prior to the Dartmouth College Case it is possible to identify a number of court decisions in which the contractual nature of corporate charters did receive attention.

Probing into evolution of corporate autonomy prior to the Dartmouth College decision does not disclose a clear situation. Discussing the origins of American business corporations, for example, Oscar and Mary Handlin discount the importance of prior influence. "Not until Marshall and Story held in 1819 that the charter was a contract protected by the Federal Constitution," they write, "was a sturdy bulwark against legislative interference erected around the corporation."

> The decision in the Dartmouth College case was no token of the earlier acceptance of the theory. That Sam Adams and the Revolutionary theorists had used the compact argument against England undoubtedly helps to explain the veneration for the contract clause when it ultimately entered the service of the corporation, but there is little evidence that Adams' theory was thus applied or that the act of incorporation was thus conceived in the forty years before the Dartmouth College case. . . . (Oscar and Mary Handlin, page 119)

Similarly, Benjamin F. Wright's book, The Contract Clause of the Constitution, does not support a Lockean basis for this particular provision upon which the Marshall decision was based. Rather, Wright stresses the economic concerns related to the issuance of money and to private contracts as the motivating forces for the clause (Section 10, Article 1) which did not appear to attract any significant interest, pro or con, at the time of its inclusion in the Constitution. (Pages 3-16) His investigations disclose only one reference in the discussions and debates surrounding the adoption of the Constitution which relate this clause to the compact idea.* James Madison in the Federalist papers did comment as follows:

> Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. (Madison, 1966, page 282)

The question can be raised as to whether the happenstance of the appointment of John Marshall to the Supreme Court was not the real basis for the protection afforded to private corporations; and, in turn, that he grasped the "contract clause" as a means to support his convictions and interests. (Wright, page 27) The answer cannot be a positive one in terms of the investigations for this analysis. The evidence does

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* However, as discussed below, there is some evidence that James Wilson, attorney in the Bank of North America case previously mentioned, apparently supported the contract clause in the constitution as well as the contractual interpretation of the legitimacy of charters.

indicate, as Wright notes, that there were previously opinions which supported a broadened interpretation of the clause. There were a number of cases in which the rights of private corporations against direct legislative intrusions were recognized. One finds evidences of a distinction between public and private corporations, a premise for the Dartmouth College Case decision related to the Marshall interpretation of the contract clause.

From this perspective, this section will examine the cases preliminary to that of Dartmouth College and supportive of the application of the compact idea to corporate law. Then, it will review briefly the background and substance of the famous Marshall opinion of 1819.

Cases Preliminary to the Dartmouth College Case Decision

If one wanted to push historical origins to their extremes, presumably precedents for the contract clause decision do exist in the seventeenth century English history. The 1613 Case of Sutton's Hospital, noted earlier, did establish for English law the point that a corporation charter was something more than a mere privilege, once it was granted and accepted. By 1692, according to R. M. Denham, in the case of King v. London, "the inability of the King to dissolve a corporation was finally settled." (Page 207) Yet, it must be remembered, that Parliament could by formal action revoke a charter. While some protection for corporations from capriciousness by government and some assurance for corporate stability and durability did develop in English law, the Lockean reservations upon the power of the state over individual property and other rights never obtained in the sense of the Marshall decision.

Undoubtedly a spectrum of influences underlay the general acceptance of the Lockean conception of natural rights and of the sovreignty of the people in a nation. Whatever the reasons, however, Lockean ideas did flavor strongly the federal and state constitutions and these constitutions (rather than Congress or the state legislatures) stood as the ultimate sovereignty, an expression of the will of the people. It was to these constitutions, therefore, that the courts looked as, over time, they reviewed issues related to the relationships between individuals and governments. Furthermore, it was the contract clause in the federal constitution which served Chief Justice Marshall in his decision to support the original trustees of the College.

Yet, the extent to which the contract clause represented an explicit statement for the protection of contracts in the sense that Marshall used it remains questionable. In general, historians appear to view the decision as a precedent itself in [redacted] that Marshall initiated an interpretation to suit his purposes. One commentator, however, does associate the clause with Lockean principles of social compact. R. M. Denham (in the Michigan Law Review) attributes to Lawyer James Wilson (later a justice on the Supreme Court) an influence in this connection. Apparently Wilson did have some part in the writing of this section of the Constitution and had been associated with an explication of the compact idea. In his defense of the charter of the Bank of North America against intrusions by the Pennsylvania legislature, for example, Wilson stressed the need for confidence in the engagements of the government (as one of five points in his argument). To this end he is quoted as asserting that

the "act of incorporation 'formed a charter or compart' between the legislature and the Bank." (J. S. Davis, II, page 311) "It is to be considered," Wilson wrote in the same connection, "as a compact, and to be interpreted according to the rules and maxims by which compacts are governed.* In support of Wilson, Thomas Paine stressed in a similar vein the contractual nature of the charter. (J. S. Davis, II, page 312)

As business corporations increased in number at the end of the eighteenth century and disputes involving corporate rights and protections occasionally entered the courts, there appeared some recognition of the compact idea, and the companion stipulation differentiating private from public corporations. In his book on the contract clause Benjamin F. Wright refers to two cases in the Federal circuit courts prior to 1800 in which the idea of limitations upon legislative rights to alter charters appears. (Pages 19-22) An early ruling which did involve property rights of corporations if not the contract idea per se was that of the North Carolina Supreme Court in 1805. In Trustees of the University v. Foy this court held in violation of the "law of the land" a legislative statute repealing a grant of land to the University made in its original founding. The court rejected the contention of counsel for the State that the legislature could in effect destroy that which it created. To some degree the generalizability of the decision was mitigated by the

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* Quoted from Wilson's Works (pages 565-77) by J. S. Davis (II, pages 310-11). Denham described Wilson as "a very learned lawyer who always contended that acts of a legislative body were of the nature of compacts, particularly when rights were vested under them; and there is also little doubt that he was aiming at this when he urged the insertion of that clause in the Constitution." (Page 216)

Court's premise that the University "stood 'on higher grounds than any other aggregate corporation,' since it was 'not only protected by common law but sanctioned by the constitution.'" (Dodd, page 19)

Nevertheless, Edwin M. Dodd does interpret this decision as the first he found in which the scope of legislative power over corporations was considered. "The decision," he notes, "clearly implied that the members of what courts were soon to describe as private corporations have property rights which the legislature is powerless to infringe, although it did not indicate clearly whether those rights included the right to continue to act as a corporation." (Page 20) Chief Justice Marshall himself handed down an early decision in 1805 in which he stated the contract idea. "This is a contract," he said of a Pennsylvania act providing for the sale of lands, "and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally."*

Most significant of all, however, in the establishment of the contractual and property rights of corporations vis a vis government were four cases decided by the Marshall Court between 1810 and 1819 in which the Chief Justice expressed his "four great contract opinions," (Wright, page 28) culminating in that for the Dartmouth College Case. The first of these, Fletcher v. Peck in 1810, grew out of the sale of lands by a

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* As quoted by Benjamin F. Wright (page 29). About the case Wright comments: "In Huidekoper's Lessee v. Douglas the Court was asked to construe the meaning of a Pennsylvania act of April 3, 1792, providing for the sale of lands in the western part of the state. There was no subsequent act, and no question of impairment of contract."

corrupt Georgia legislature 15 years previously to speculators. The question raised was that of the soundness of titles purchased from these speculators. Two arguments bear upon the contract clause, one more directly than the other. The first was by Alexander Hamilton when approached by the speculators shortly after the purchase. Regardless of the merits of the original action, Hamilton judged a second act, repealing the sale, inappropriate. He based his opinion in part of the contract clause of the Constitution.* Marshall's statement for the court in the case itself corroborated Hamilton, but failed to speak directly to the contractual nature of a charter, relying upon an adherence to "general principles, which are common to our free institutions," and "particular provisions of the constitution of the United States." (Robbins, page 172; Wright, pages 21-25, 29-34)

In the next case, that of New Jersey v. Wilson in 1812, Marshall's opinion stipulated more clearly limitations upon legislatures inherent in his view of the contract clause. The case had to do with a legislative act of 1804 withdrawing tax exemption from land originally held by a tribe of Indians but then sold by them to another owner. Marshall held that since the exemption was not a personal benefit to the Indians but annexed to the land, it constituted a contract. The 1804 act was void. (Wright, pages 35-7) Again in the 1819 decision on Sturges v. Crowninshield,

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* Benjamin F. Wright quotes Hamilton's argument, in part, as follows: "In addition to these general considerations, placing the revocation in a very unfavorable light, the Constitution of the United States, article first, section tenth, declares that no state shall pass a law impairing the obligations of contract." (Page 22)

the Marshall Court used the contract clause as the basis for negating a New York bankruptcy act as it applied to a contract of debt made before its passage. His reasoning, according to Wright, was that the framers of the Constitution intended to establish a principle that contracts must not be interfered with by legislative activity. (Pages 48-9)

The other important decision of the Supreme Court related to the contract clause came in 1815 in the case of Terrett v. Taylor. In this decision Justice Joseph Story wrote the Court's opinion which held unconstitutional acts of the Virginia legislature denying the title of the Protestant Episcopal Church of Alexandria to certain lands which it owned and appropriating them to the State. Justice Story did not base his opinion on the contract clause, but referred to the "principles of natural justice." He did make a distinction between public and private corporations, however, the former being subject to legislative control in his view. For private corporations he judged that legislatures were bound by previous law. (Dodd, pages 25-6; Oscar and Mary Handlin, pages 120-1; Robbins, pages 172-3; Wright, pages 38-9)

In the two decades prior to the Dartmouth College Case decision, therefore, the two conceptions basic to the autonomy of private colleges had gained at least preliminary form. In contrast to practice during the colonial era, the rights of legislatures to intrude capriciously into the affairs of corporations underwent some juridicial restrictions. Concurrently, the courts began to differentiate between the autonomy of private corporations and the control of legislatures over public corporations. What remained to be done then was a clearer confirmation of

corporate autonomy and a clarification of the role of the colleges as private or public corporations. Until the 1819 Marshall decision this difference did not become a matter of focused concern. By and large the colleges continued to receive financial support from state governments which in turn frequently intruded into their affairs. As in the cases of Pennsylvania and Harvard, legislatures altered charters. In most colleges, officers of state governments served on governing boards in a regular or ex-officio status. The Dartmouth College case brought this relationship into dispute and in doing so established a legal distinction between public and private higher education.

The Dartmouth College Case

Despite the antecedent situations surveyed briefly on the last few pages, Marshall's decision in 1819 constituted an interpretation of the contract clause which undoubtedly went beyond any intent of the writers of the Constitution. It brought out more sharply than previous decisions the Chief Justice's sentiments related to the rights of property and a connection between corporate and property rights. His position, which followed easily from Lockean philosophy, supported the rights of individuals but related more to economic interests and a stable economic system oriented to the national government than to political liberty -- a point of view in line with Federalist polity.

For the colleges, the Dartmouth College case raised in a very forthright manner a question heretofore not of major importance. Were they public or private institutions; and, as a consequence, what in turn was their relationship to state legislatures? Both points enter into

Marshall's opinion, as they did in the arguments of counsels before the New Hampshire court.

The case itself arose out of circumstances by no means uncommon to the colleges of the day: religious conflicts augmented by personality clashes. The president of the College and son of its founder, John Wheelock, became embroiled first with his faculty and then the Trustees over the control and doctrines of the local church. Specifically it had to do with whether a newly appointed theological professor, Roswell Shurtleff, should assume also the traditional duties of pastor of the Church of Christ at the College in the fact of Wheelock's preference to have the pastoral duties retained by a Professor John Smith who had held the post on an interim basis. The stubborn and forceful nature of the President combined with his desire to dominate College affairs prevented several attempts to compromise the situation. (North, page 181) "The issue gradually took a form in which Presbyterians, who were inclined toward the Calvinistic faith in theology and who were partisans of Jeffersonianism in politics, were on one side and the Congregationalists, who were to be deemed more rigid and bigoted in their religious views and who had adopted Federalist principles of politics, were on the other." (Haines, page 379)

In the course of the controversy, Wheelock with the support of a close associate, Elijah Parish, minister at Byfield, Massachusetts, broadened the controversy beyond the boundaries of the College. In turn, the Trustees on several occasions made appointments against his wishes. The inevitable result was the dismissal of Wheelock as President by the Trustees and the eruption of the controversy into a political issue.

It became in fact a major, if not the major, point of conflict in the 1816 campaign for the governorship and legislature of New Hampshire between the Federalists and the Republicans. The leadership of the Republican Party grasped on to the College controversy for its political potential and won the election.

The new Republican-dominated legislature moved quickly to implement campaign promises, enacting in the summer of 1816 the recommendations of the Governor for the alteration of the charter of Dartmouth College. The action of the legislature changed the name of the College to Dartmouth University; increased the number of Trustees from twelve to twenty-one so that the Republicans could have control of the board to support John Wheelock; established a board of twenty-five Overseers with veto power over the acts of the Trustees; enabled the Governor to fill the new nine vacancies on the Board of Trustees as well as visit and inspect the University itself; and required the President and Professors to take an oath in support of the Constitution of the United States and the State of New Hampshire. The Overseers included the President of the Senate and Speaker of the House in New Hampshire as well as the Governor and Lieutenant Governor of Vermont along with twenty-one other members appointed by the Governor and Council.

The new Trustees and Overseers met in August of that year, but it was not until early in 1817 that they moved to reorganize the institution and confirm Wheelock's position as President. About the same time, the original Trustees instituted a law suit to obtain the records, Seal, and charter of the "College" from William Woodward, who as clerk of the Board and

treasurer remained loyal to Wheelock and retained custody of these documents.*

From its inception the case remained a political as well as a legal issue, a controversy between Republicans and Federalists. Whatever the astute and able governor of New Hampshire may have done to extract the affair from the more rabid political emotions of the State, the partisan lines were drawn and remained so. The New Hampshire court was the Governor's court, chosen by him in a recent reorganization of the State's judiciary. A decision favorable to the University came from it as anticipated.

When the appeal went to the Supreme Court in Washington, the College Trustees had their case in a different milieu, one which Webster proved quite amenable of using to the advantage of his clients. Accounts of the case take note of his eloquence and his ability to play upon the Federalist convictions of Marshall and the antagonism of the Chief Justice to Jefferson and the Republicans. In addition, historians of the case credit Webster and the College supporters with effectively exerting personal influence upon members of the Court during the year which elapsed between the hearing itself and the decision of the Court announced in 1819. Adherents of the University apparently lapsed into overconfidence in the

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* The significance and controversial nature of Marshall's opinion in this case has stimulated a great many accounts of its background and implications. This discussion is based on references by Clapp, Dodd, Haines, Oscar and Mary Handlin, Isaacs, North, Richardson, Robbins, Shirley, Stites, Wilson (1874), and Wright.

strength of their case and fared badly both at the trial and during the subsequent lobbying. Their final effort to gain a rehearing received a studied inattention from Chief Justice Marshall when he rose formally to present the decision of the Court. (Haines, pages 379-422; Richardson, pages 338-42, Shirley, Ch. VI)*

The impact of this verdict upon nature of the economic life of the country has led to a very substantial body of literature dealing with the decision. For, while the case itself concerned a college, there were many more business corporations than colleges. "By the end of the eighteenth century, the business corporation, in one form or another, was a familiar figure in all the large towns and through much of the country." (J. S. Davis, II, page 330) The decision in the case may not have been causative in terms of this development, but it certainly did facilitate and encourage an increasingly frequent use of the corporate form. As Dodd points out, it was not only the property which could be accumulated on the basis of the charter but the "charter itself with any special rights which it might grant which was immunized against legislative abrogation or modification." (Page 28) The result over the subsequent century lies in the emergence of the great corporate enterprises which by the twentieth century had begun to dominate the economic life of the nation and prove

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* In his footnote commenting on this situation, Stites notes some question concerning the actual situation in court. He refers to contradictory evidence related to the efforts of Attorney William Pinkney, representing the University, to reargue the case. He does state, however, that "it is safe to assume that Marshall was aware of the intent to reargue, whatever his reason for not allowing it." (Page 145)

a force in competition with that of the government itself. As might be expected in such a situation, the inevitable excesses of this great power resting upon a foundation of judicially protected freedom from public control have brought on an expanded definition of the nature of the public welfare. What began with anti-trust legislation has carried over into a variety of controls over corporate operations which are not without parallel in education. In the retrospect of time, one can understand the questioning by another James Wilson in 1874 of the validity of the decision of the Marshall Court in 1819, and his judgment that a "remedy must sooner or later be found for the evil consequences which . . . directly flow from it [the Marshall decision]."* (Wilson, 1874, page 239)

Whatever the implications in general, for higher education the decision had great influence. It established the legal basis for the corporate nature of private colleges and universities and made explicit the distinction between private and public institutions, a condition previously only very vaguely acknowledged. It, in effect, established the legal foundation for the distinctively American system of universities and colleges and for their relationships with the public governments.

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* In this regard Stites in his concluding chapter examines the use by courts of the police power of the states during the late nineteenth and current centuries as a rationale for regulating the corporations. This interpretation combined with a reliance upon the due process clause of the Fourteenth Amendment gradually shifted the judicial basis for handling corporation-government relations away from the principles set forth in the Dartmouth College Case. Stites quotes the reference of Charles Evans Hughes to the history of the Court's contract decisions as reflecting a "growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." (Page 112)

Counsels for the College and Judge Story in his assenting opinion did attempt to apply English precedents. However, as James Wilson points out, it was hard going. As noted previously, in the last analysis English corporations were subject to the authority of Parliament which could and at times did dissolve such associations.* Thus, the autonomy of private corporations did not arise, since this authority left no room for such a consideration. The precedent brought out in the arguments insofar as legal decisions had relevance was the Exeter College Case (Philip v. Bury) which had to do with a dispute about the rights of visitation over public charities. While this case could be considered to have some relationship to the idea of public and private corporations, in the view of James T. Robbins its application was very limited. (Pages 177-9) The English law had not developed this distinction, a point discussed earlier in this analysis.**

The arguments against the applicability of English precedents, however, would seem to have a basis in a more fundamental and pervasive condition. A clear difference had emerged between the two countries in the nature of sovereignty. The fact that the state and federal constitutions reflected the will of the people (as in Lockean terms a compact voluntarily entered into) meant that these documents and not the legislatures stood as final authorities, subject to interpretation by the courts. In contrast the right of Parliament to alter and revoke corporate charters made clear different conditions existed in England than in the United States, one not appropriate to the case in question, therefore. In fact, this rationale

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* A power demonstrated, for example, in 1858 when Parliament abolished the East India Company five years after it had renewed the company's charter for twenty years.

See discussion page 76.

** "The whole issue in these early English cases, then, was not whether legislatures should be excluded from corporate affairs, but whether the courts should intervene to mitigate the allegedly harsh government of charitable institutions." (Robbins, page 178)

constituted a significant aspect of the thinking behind the College's case at its inception and was voiced in correspondence to the major counsel in the preparation of the arguments to the New Hampshire court. (Shirley, pages 155-57) It also is interesting in this regard that the literature about the case does not stress the Lockean influence back of this difference between the English and American systems. If government exists as a social compact subject to the sovereignty of the people, it would seem that written constitutions constitute the charters or contracts for government and thus the formal expression of the popular sovereignty. From this view, it would seem also that English precedents would lack significance with respect to constitutional provisions, as they apparently did in the opinion given by Chief Justice Marshall. However, the early nineteenth century was a time in which constitutions were undergoing their first tests in practice and in law. The Dartmouth College Case came during this formative period. The arguments in it, quite understandably, encompassed a combination of constitutional article, English precedent, and general references to natural law, rights of men, and similar assumptions.

Whatever the justification, however, the distinction between public and private corporations and the autonomy of the latter permeated the arguments during the case. Counsels for the College, Jeremiah Mason and Jeremiah Smith, in their statements to the New Hampshire Supreme Court distinguished between civil or public (towns, cities, etc.) and private (banks, turnpike companies, etc.) corporations. A college devoted to the promotion of learning was considered to be an eleemosynary institution or private ~~corporate~~ corporation within this line of reasoning, and thus not

subject to control by the state as a public corporation. (Haines, page 383) The legislature lacked the right to take away the College's property and privileges. The legislative act [changing the College charter] constituted a violation of the constituion of New Hampshire and the contract clause of the Constitution of the United States. Mason and Smith assumed, therefore, that the charter had been granted to the founder of the College who had provided for a corporate body, the Trustees, to serve as the holders of its privileges and properties* and that this charter retained its legality and essential nature after the Revolution. For the University, counsels George Sullivan and Ichabod Bartlett argued to the contrary: that the College was a public corporation and "its property was designed entirely for the public welfare and was accordingly subject to public control." Its charter was by no means an implied contract, certainly not in the sense of the contract clause of the Constitution. They denied any English precedents, since Parliament did have sovereign and final authority. They noted as relevant actions by legislatures in Connecticut and Massachusetts altering the charters of Yale and Harvard, and pointed especially to the changes in the Harvard charter made in 1810, 1812, and 1814 which were not challenged by the Overseers or Corporation of that institution.**

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* It did provide, however, that Wheelock had the right to choose his first successor, a provision which led ultimately to the selection of his son with the approval of the Trustees.

** As noted previously, a Federalist dominated Massachusetts legislature in 1810 altered the constituency of the Board of Overseers, an act rescinded by a Republican majority in 1812. In 1812, however, the Federalists again won control and two years later reestablished the 1810 legislation, an action "promptly accepted by both governing Boards of the University (and) remained the organic act of the Overseers for almost forty years." No court action grew out of the changes. (Morison, 1946, pages 212-14)

Chief Justice Richardson's opinion delivered for the state court of three justices upheld the constitutionality of the legislature's actions. Dartmouth College, he stated, was a public corporation, thus the constitutional right of the legislature to interfere in the concerns of a private corporation were not at issue. The sense of his opinion is quoted by John M. Shirley, as follows:

> "'1. The corporation of Dartmouth College is a public corporation.
>
> '2. An act of the Legislature, adding new members to such a corporation, without the consent of the old corporation, is not repugnant to the Constitution of the State.
>
> '3. The charter of the king, creating the corporation of Dartmouth College, is not a contract within the meaning of that clause in the Constitution of the United States which prohibits States from passing laws impairing the obligation of contracts.'" (Page 187)

The opinion defined at length the nature of private and public corporations. "Public corporations are those which are created for public purposes, and whose property is devoted to the objects for which they are created," was the opinion of the court. "A corporation," it continued, "all of whose franchises are exercised for public purposes, is a public corporation." (Shirley, page 188) In taking this position, Richardson spoke from a commitment to Republican concepts of the purposes of government as the protector of the common good, a sentiment apparent in the following statement from his opinion:

> No man prizes more highly than I do the literary institutions of our country, or would go farther to maintain their just rights and privileges. But I cannot bring myself to believe, that it would be consistent with sound policy, or ultimately with the true interests of literature itself, to place the great public institutions in which all young men, destined for the liberal professions are to be educated, within the absolute control of a few individuals

> and out of the control of the sovereign power -- not consistent with sound policy, because it is a matter of too great moment, too intimately connected with public welfare and prosperity, to be thus entrusted in the hands of a few. The education of the rising generation is a matter of the highest public concern, and is worthy of the best attention of every legislature."*

Webster thought that Chief Justice Richardson's opinion was "able, ingenious, and plausible." (Haines, page 390; Shirley, page 192) But, in his comments on the decision, he disagreed on the grounds that every citizen has the right to judicial inquiry and formal trial in actions which threaten life, liberty, property, and immunities under the protection of the general rules which govern society. It was on this basis that he presented the arguments for the College to the Supreme Court in Washington a year later. He used essentially the same line of argument as Mason and Smith in their statements to the New Hampshire court, but embellished them with an eloquence and understanding of Marshall and his associates that proved in the end persuasive.** Counsels for the University were both ineffective and inadequately prepared and presented no points additional to those made previously in New Hampshire***.

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* Quoted from Haines (Page 389)

** Apparently the printed version of Webster's speech contains only his basic legal points and fails to convey its full flavor.

*** Confident that the Court would find in their favor, officers of the State and University decided against the expense of sending to Washington their counsels and relied upon John Holmes, a representative of the state in Congress, and William Wirt, then Attorney General of the United States. Mason and Smith did not wish to appear in Washington, so that the case for the College was entrusted to Webster. (Richardson, pages 332-8)

Webster's reasoning, which anticipated the opinion of Marshall, developed two premises. "It will be contended," he said at the outset ". . . that these acts are not valid and binding on them [the Trustees of the College] without their assent. 1. Because they are against the common right and the constitution of New Hampshire. 2. Because they are repugnant to the constitution of the United States." He developed the argument that the College was an eleemosynary institution, chartered as a private charity, and placed by its founder under the control, including the power of visitation, of a board of twelve trustees. As such it was, he insisted, a private corporation. He presented the "doctrine that all eleemosynary corporations are private bodies. They are founded by private persons, and on private property." Thus, he contended, "the acts in question violate property. They take away privileges, immunities, and franchises." (Hostadter and Smith, pages 204-10)

From this premise, Webster than contended that the acts of the New Hampshire legislature violated the contract clause of the Constitution in the sense that this clause prohibited bills of attainder, ex post facto laws, and laws impairing the obligations of the contract. The original charter of 1769 did constitute a contract and did remain binding. In this sense, he noted, the case had broader implications. "It affects not only this college, but every college and all literary institutions of the country." (Hofstadter and Smith, pages 210-212)

Whatever the shortcomings of the case for the University, Marshall's opinion gave short shrift to the most significant aspect of the case and to a position maintained with considerable legal basis in that day, for it

was by no means accepted that a charter constituted a contract. His decision went directly to this point without precedent or rational justification. "It can require no argument," he stated at the very outset, "to prove that the circumstances of this case constitute a contract.." He then directed his judgment to two questions. "Is this contract protected by the constitution of the United States? Is it impaired by the acts under which the defendant holds?" He spoke affirmatively to both. (Hofstadter and Smith, page 213)

Stressing the protection of the contract clause in the Constitution against legislative violations of the "right to property," Marshall found that the College was a private eleemosynary institution "incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty." Its trustees or governors were not public officers, nor was it a civil institution "participating in the administration of government." The charter, in his words, was "a contract, on the faith of which real and personal estate has been conveyed to the corporation." On the basis of which assertion, he then concluded: "The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States." Since the charter was a contract, obligatory on the New Hampshire legislature as it was upon the king before it, he founds the acts in question "repugnant to the constitution of the United States" and that the judgment of the State Court was therefore reversed. (Hofstadter and Smith, pages 213-9)

Of the Marshall decision, Benjamin F. Wright in his study of the contract clause, comments: "It is safe to assert that the contract clause as the Framers thought of it was a very different thing from the clause at the end of Marshall's years on the Supreme Court. No one can be sure how important a place in American constitutional law and economic history the clause would have had if Jefferson, rather than Adams, had appointed a Chief Justice in 1801." (Page 27) Judgments of Marshall's opinion differ, but clearly his reasoning about contracts lacked legal precedents. Shirley, Wilson, and Haines all question the validity of the grounds upon which Marshall based his logic. As the latter comments, the opinion "is a good illustration of the method of the Chief Justice in construing and stating facts which give a plausible basis for the legal and political theories he wished to announce, without adhering closely to the actual evidence in the case." (Pages 404-5) However, as developed earlier in this section, the Marshall opinion is not without portention. Prior cases anticipated his interpretation of the contract clause. Certainly this perception of it appeared in the arguments of the counsels for the College. More fundamentally, it seems to this writer, the Marshall judgment did fit the temper of Lockean philosophy to the extent that it reflected a view of government as a compact among individuals and that it tended to interpret personal rights in terms of rights to property. It contained a strong flavor of the individualism of the times which looked upon government with a certain fear and which sought, in both the state constitutions and the federal constitution, to protect individuals from unlicensed actions by government which intruded upon their freedom and their rights. It gave to corporations as "artificial beings" the

protection to "rights of property" which real persons enjoyed in the new society. In this sense, it fitted that spirit of rebellion against autocratic monarchy which, with all of the economic overtones involved, did bolster the cause of the American Revolution.

That Dartmouth College as a particular institution fitted the Marshall interpretation perhaps proffers a reasonable question. Its private patronage was donated for the Indian charity school. Funds for the College were "donated by the state or were subscribed under state assistance." As Haines points out, it was "more in the nature of a public than a private institution." (Page 410) The actions of the state did not alter the integrity of the governing board per se; the corporate entity remained. And certainly no precedent existed in college-state government relations that other than supported the rights of legislatures to intrude into the affairs of higher education as a matter of public interest. The whole idea even of a distinction between public and private corporations, much less colleges, had no basis in legal practice prior to this case. Clearly, Marshall's concerns ranged far wider than simply the rights of a college or of colleges in general. They reflected a pervacive -- and Federalist -- thinking about the nature of private enterprise and the economic rights of a growing class of business men and landholders. In retrospect, it served these rights well and built a solid foundation for the corporate form as the means for the economic growth of the nation in the nineteenth century. In a way, it would seem that its impact on higher education came as a peripheral influence; yet its impact was a very decisive one.

Justice Story submitted an extensive concurring opinion to that of Marshall in which he extended even further the freedom of corporations from public control insofar as their private property was concerned, including such public associations as counties, towns, and cities. "It is a principle of the common law," he adjudged, "which has been recognized as well in this as in other countries, that the division of an empire works no forfeiture of previously vested rights of property. And this maxim is equally consonant with the common sense of mankind and the maxims of eternal justice."* He supported the division of corporations into those public and those private, basing his position on the Exeter College Case.** Justice Washington presented a brief opinion concurring with Marshall. There was one dissent.***

Implications of the Decision

"At its origin in Massachusetts," as Oscar and Mary Handlin write, "the corporation was conceived as an agency of government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the state. Turnpikes, not trade, banks not land speculation, were its province because the community, not the enterprising capitalists, marked out its sphere of activity." (Page 123)

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* Quoted from Haines (page 412).

** Actually, according to several analyses, a doubtful precedent, since this case dealt with "privateness" of charitable institutions rather than corporations as such. (See Robbins, pages 178-80)

*** Francis N. Stites includes in his history of the Dartmouth College Case an excellent listing of interpretations and commentaries published in law journals. (Pages 165-68)

Colleges clearly fell within this category. The decision of 1819, however, changed their condition drastically. A contemporary authority, Chancellor James Kent of New York, jurist and law professor at Columbia, described its impact as follows:

> It did more than any other single act proceeding from the authority of the United States to throw an impregnable barrier around all rights and franchises derived from the grant of government, and to give solidity and inviolability to the literary charitable, religious and commercial institutions of our Country.*

The decision opened up a clear division between private and public colleges. As could easily be understood, legislatures subsequently became increasingly reluctant -- especially during the surge toward the expansion of public higher education after the Civil War -- to budget public funds for activities beyond their ability to control.

Yet, it should be noted in this connection that prior to 1819 several essentially public colleges had been established. The University of Vermont was chartered in 1791, named and located by the legislature. Its founding statute specified also that the Governor and Speaker of the House were to serve as members of the board in an ex-officio status. However, the board received full corporate powers to control and manage the University and thus apparently served as a private or semi-private body. Certainly no term of office for trustees was indicated. In 1810 a modification by the legislature of the original statute stipulated that thereafter

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* Quoted from Richardson (Page 344). It should be noted here that in general the case received scant attention at the time, except in New Hampshire and on the part of those directly involved. It did establish Webster as an attorney of rising stature, however.

the trustees were to be elected by both houses of the legislature -- but no term of office was set -- and that the Board was to report annually to the legislature on the "state and condition of funds." An 1823 act increasing the size of the Board also gave the Governor, among others, authority to call a meeting of the Board. Thus, Vermont emerged as what might be called a semi-state university. (Organization of the University of Vermont, pages 17-23)

Two other state universities also were formed in a similar condition. In North Carolina, a 1789 charter for the University enacted by the legislature intended higher education as a public responsibility and supported this intent with funds and some state lands. Yet, it set up a governing board as a self-perpetuating body, even though its membership was to be based upon the state's judicial districts. (Battle, page 6) Trustees appointed by the governor did not assume control until 1876. (Brody, page 46) Previously, the legislature of Georgia in 1785 voted the establishment of a Senatus Academicus holding the responsibility for "the general superintendence and regulation of the Literature of the State" as well as the University. This body consisted of two boards: one the Board of Visitors "vested with all the powers of visitation" and the other the Board of Trustees holding the usual corporate authority for the management of the institution. The former consisted of the Governor and Council, the Speaker of the Assembly, and the Chief Justice; but the Trustees held the right of cooptation. Nevertheless the government of the University was specifically subjected to the control of the General Assembly. (First Charter, pages 8-9) In this sense, therefore, some precedents for public control preceded the Dartmouth College Case decision, but in practice the separation between public and private institutions had limited importance.

After 1819 the autonomy of private colleges continued to receive judicial support in the few cases which reached the Supreme Court. The contractual interpretation of charters reinforced their freedom from direct legislative intrusions, an autonomy mitigated to some degree by the use of "reservation clauses" enacted to retain to the state legislatures right to repeal or amend charters.* According to a brief history of the post-Dartmouth College Case status of private colleges by Gordon R. Clapp, the courts responded to such clauses by setting rather definite limits beyond which legislatures were restrained from going. Whatever reservations charters may have contained, courts have upheld the "limits of constitutional prohibitions guaranteeing the inviolability of contracts and rights of private property with or without the assent of the corporation," he states. (Page 81) An examination of this history confirms also that the terms of a charter and not the source of financial support determine the public or private character of an institution.

For all colleges and universities, the use of the corporate form continued as the mechanism for the establishment and governance of institutions of the higher learning; whether as a private or a public corporation, formed by charter for the former or legislative act or constitutional provision for the latter.** Within this framework much of the autonomy associated with corporations in general carried over to the academic enterprise.

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* Actually, according to Wright, the first of these clauses appeared as early as 1805. (Pages 58-59)

** The exceptions being normal schools and subsequently state teachers colleges provided for by state boards of education as a part of teacher training associated with public schools.

EPILOGUE: POST DARTMOUTH COLLEGE CASE

The Dartmouth College case has been called the "foremost case in American constitutional law." (Haines, page 379) At the same time, it takes little retrospection to recognize that this view of its influence well can assume proportions out of line with its real importance. Certainly, the protection of private corporations in the decision underwent modifications by the Supreme Court under Marshall and subsequent Chief Justices during the following decades. It has been subject to increasing restrictions during this century in a variety of ways as governments at both federal and state levels have moved to exercise increasing supervision of the total economic life of the nation under a broadened concept of the public interest.

For higher education, the most significant impact of the decision has related to the dichotomy between private and public corporations as the recipients of authority for the management of colleges and universities. The autonomy of private institutions has remained clear and firm, until in recent years they have been forced to accept some public funding. In the public sector, one finds a parallel form in the use of public corporations to maintain other "public" functions desired by state governments. These have included such activities as the supervision of utilities, bridge and regional transportation authorities, public service commissions, and similar bodies given a corporate form and consequently a semi-autonomous condition.

This concluding section will review the influence of the Dartmouth College Case decision in terms of the emergence of public colleges and universities, note modifications of it which took form in subsequent court cases, and examine briefly the corporate nature of higher institutions in the present century. Finally, in surveying the essential nature of college and university government one must at least note developments currently taking place as public higher education increasingly monopolizes the field, bringing with it an increase in supervision and control by state governments.

It is difficult to assess the impact of the Dartmouth College Case decision without placing it in the context of the commitment of the American society to a college education. Although such an assessment would take this analysis beyond its purpose, some mention of the broader scope remains necessary. Whatever the private or sectarian nature of their founding, the early colleges both before and after the Revolution were considered public institutions which held value and gave prestige to the whole society. It was by no means irrelevant or intrusive in this sense that, as in the aforementioned cases of Philadelphia and Harvard, public officials and colonial and state legislatures intervened in their internal affairs. In the perspective of general practice, therefore, the action of the New Hampshire legislature and governor probably fitted more appropriately the times than the position of the College trustees and the eloquence of their attorneys.

All education in fact was to become an integral part in the developing society, of what Daniel J. Boorstin calls "the national experience."

In 1787 New York State established the University of the State of New York as a body of regents to supervise all education. By the midcentury free public schools, especially at the elementary level, had gained sufficient strength in practice to presage the necessity of a high school education for all citizens within a century. Similarly, not only sectarian groups proselyting their cause as the frontier moved westward but the new communities and states saw in the idea of a college the fulfillment of civic aspirations, the concrete evidence of "having arrived" and having achieved respectability if not culture. A spirit permeated the developing nation with the sense, as Boorstin notes, that "no community could be complete without its college or university." (Page 155) As he observed also, "the distinctively American college was neither public nor private but a community institution." (Page 160)

In the above context the distinction between private and public higher education commonplace today really did not become significant until several decades after the 1819 Supreme Court decision, the result of an extension of the commitment to educational opportunity by means of public funding exemplified in the 1862 Land Grant College Act. Public higher education began to support this commitment when private philanthropy could not do so on the expanding scale that began to emerge in the 1880s and 1890s and continued to the contemporary decades. But this committment to state colleges and universities did not result or follow directly from the Marshall decision itself. Thus one finds in the first decades after 1819 some continued public

The implications of this distinction arise in connection with two aspects of state-institution relationships, in which public support was divorced from institutional control. Historically, state governments have gained adherence to their desires for the use of funds allocated to private institutions by contractual arrangements. Yale, for example, made a contract with the State of Connecticut in 1863 for the establishment of the Agricultural College at its campus. Cornell University has similar contractual agreements with the State of New York for several of its programs.* States also founded colleges but designated for them by statute a separate, legally private governing board. Thus, for example, Bowdoin College was founded by the Massachusetts legislature in 1794. In 1831 [it then being located in the new State of Maine] the Maine legislature passed an act intended to force the president of the college from office, an action concurred in by the trustees. In the subsequent suit by the president, the Supreme Court in a decision by Justice Story supported the College as a private institution. He wrote, in part: "As founder, the Commonwealth of Massachusetts would have possessed visitorial power, if it had not intrusted that and all other power, franchises, and rights of property of the college to the trustees and overseers established by the charter, and in the manner therein stated."**

The same issue (that of state control of the colleges) had underlined the New Hampshire position with regard to Dartmouth College. Back of it

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* Home economics, agriculture, veterinary medicine, and industrial and labor relations.

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lay a divergence in philosophy between the Federalist orientation to private rights and the Republican commitment to the rights "of the people." Thus, as Francis Stites writes in his account of the Dartmouth College Case, "'sound policy' required that the College be more responsive to the people of New Hampshire. The Governor intended to make Dartmouth an ideal state college." (Page 29) A major aspect of the Case clearly was the question of the rights of legislatures relative to institutions they founded and/or supported and of their obligation to provide educational opportunity at all levels.

This same espousal of the authority of legislatures over education as an essentially public endeavor voiced by the New Hampshire Governor motivated Thomas Jefferson in the founding of the University of Virginia. To implement it, the Virginia act of 1818 read in part that the Rector and Visitors of the University "shall at all times conform to such laws as the legislature may from time to time enact for their government; and the said University shall in all things, at all times, be subject to the control of the Legislature."* This University which opened in 1825 anticipated in this regard the majority of state universities after the Civil War as the 1862 Land Grant College act encouraged the concept of public support to expand the opportunity for higher education to all classes in society.

While anticipating the future nature of higher institutions as public corporations, the Virginia example lacked immediate impact. The emergence

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* Act of February 21st, 1818, as quoted in "Statutory History of the University of Virginia," The Alumni Bulletin (of the University), 5:105, February 1899. In line with such control, an act one year later provided for seven Visitors appointed by the Governor and Council for one-year terms. (Elliott and Chambers, page 516)

of the colleges as truly public corporations came later. The earlier state colleges, both before and after the 1819 decision, tended to resemble the colonial prototype. They were incorporated through special statutes which provided for essentially private governing boards, frequently self-perpetuating. The courts, when such questions came to their attention, continued to regard the colleges as private activities. Higher education just did not assume the status of a public enterprise, and the concept of the truly public university did not gain general support until the latter part of the century. Concurrently, state appropriations remained limited and except for donations of land or permission to raise funds by lotteries or other means the state governments left the basic funding to private donors and student fees. (Brody, Ch. VI; Elliott and Chambers, Ch. VIII)

Thus, when the concept of higher education as a public responsibility began to capture the general popular enthusiasm, the governing forms were pretty well set. The corporate basis for colleges and universities proved the pervasive precedent. "Historically, the corporate form of organization for state universities is a survival of the private status which they originally possessed." (Brody, page 114) As might be expected, the replication was by no means a complete one. Modifications of corporate autonomy reshaped the nature of university and college governments under legislative and executive pressures. During the course of the nineteenth century the courts in general recognized the sovereignty of state governments in a way that deprived boards of public institutions of many of the autonomies which their private counterparts enjoyed. Nevertheless, the corporate form used for the public sector assigned to governing boards most of the prerogatives and responsibilities having to do with the following corporate functions: (Brody, Ch. VI)

Control of property, distinguishing, however, between that which belonged to the university as such and that which they managed as agents of the state government.

Power to contract and be contracted with, subject also to the distinction between affairs and monies in which the board acted as agent of the state and those in which it held a proprietary interest.

Administration of funds in terms of the fiscal management of the institution, subject always to regulations governing state finances, but with considerable autonomy for monies derived from non-governmental sources. Courts reviewing this function tended to view the corporation as a convenience by means of which the state implemented the purposes of higher education.

Right to sue and liability to be sued, within which the immunity from liability normally an attribute of public government has intruded complications. A safe generalization restricts this condition to transactions related to corporate business but not where the property or interests of the state are directly involved.

Power to borrow money, subject to limitations imposed by statute and state policies.

Power to enact governing rules and regulations and maintain "scholastic discipline" which in general is implicit in the nature of the corporation than explicit in statute or constitution.

Power to engage and discharge faculty members and administrators which in the final analysis has undergone modification in terms of the practice of many states to view such persons as public employees.

Right to charge tuition and incidental fees as part of the financial management of the institution yet subject to state policies regarding free or low-cost admission. Again, as above, this power has been interpreted in terms of the management of properties and activities not considered directly a part of the state's provisions.

The concept of higher education as an autonomous or semi-autonomous activity, therefore, carried over into the management of public colleges and universities. Legislatures, and the courts as well, have tended to view this function as something apart from the regular bureaucracy of government. They have delegated to regents or trustees, as fractional or

subgovernments, a substantial autonomy within which to create and to manage educational institutions. In some states the people themselves through sections or articles in state constitutions have authorized colleges and universities, either by creating them directly or by specifying their establishment as an obligation of the legislature.* As noted, the only major exceptions to this practice have been normal schools and state teachers colleges established by state departments of education; and in recent years as these have been converted to state colleges they have been turned over to governing boards.

For the private colleges, the 1819 decision settled once and for all the question of their autonomy from direct intrusions by state governments. Al[illegible] with business and other private enterprises, they benefited from a corporate charter, "once the jealously guarded gift of the sovereign, now . . . the judicially guarded 'right' of the subject," in the words of James Robbins. As he comments further, the pleas of Webster, the citations to English precedent of Justice Story, and the logic of Justice Marshall "all conspired to give the private corporation a most auspicious introduction into our jurisprudence." (Page 180) For the private college, the

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* The idea of constitutional provision for higher education was initiated by Michigan in 1850 when the University was placed under a Board of Regents elected on the basis of judicial circuits in what amounted to a fourth branch of government, a pattern adopted for Michigan State in 1908. In all, "twenty-seven of the states make explicit reference to higher education in their constitutions. The remainder of the states, through exercise of policy powers have legislatively provided for higher education." (Alexander and Solomon, page 26) In this connection, Alexander and Solomon continue with the following comment: "Of the states with constitutional provisions for higher education, at least nine guarantee constitutional autonomy for universities. (Michigan, Minnesota, California, Colorado, Georgia, Idaho, Oklahoma, Nevada, and Arizona) In these states the constitution elevates the university above the condition of a mere agency of the legislature and places it in a position of pre-eminence in the state's legal structure."

decision set solid legal precedent for the protection of its identity in perpetuity as a distinctive enterprise, privately endowed to maintain a public function, as a private corporation yet in part publicly-supported by tax exemptions and other special privileges. In the aftermath of the 1819 decision and subsequent cases by the end of the nineteenth century, as Clapp summarizes in his brief review of this legal background, "the charter is usually considered a contract to perpetuate the founder's will, binding the contracting parties to the rules, laws, statutes, and ordinances which the founder ordains and authorizes in the charter. It is as binding upon the corporators to whom the founder delegates the obligation of carrying out the terms of the contract as it is upon the state." (Page 83)

The distinction between private and public corporations, a radical departure in the history of corporate law, cleaved higher education cleanly into two parts, a clevage which has extended well into the late twentieth century and which has given American higher education a uniqueness without counterpart in the rest of the world. In a way it created a competition between two systems in which one, the public, extended educational opportunity immensely and the other, the private, found opportunity for distinctive and at times innovative service which responded to special needs and educational creativity.

As the twentieth century has progressed, however, the autonomy of both private and public colleges and universities has undergone modification.

For the private sector, support increasingly coming from federal and state sources has carried with it controls over internal activities which frequently bypass governing boards in their execution. For the public, the erosion of corporate authority by federal agencies through policies accompanying research and other grants to institutions has been augmented by the increasing readiness of legislatures to intrude into internal affairs as higher education has become an enterprise of major public concern and expense. State executive offices, such as budget bureaus and civil service commissions, exercise authority over financial and personnel matters directly with administrative officers and frequently without reference to the role of corporate boards. Moreover, a variety of professional associations and accrediting bodies have set values and standards which in many respects exercise more influence over the educational character of higher education institutions than their governing boards. In sum, the corporate basis for university and college government so well established by the closing decades of the nineteenth century undergoes serious erosion in the twentieth, leading to the inevitable conclusion that a fresh look at the basis for college and university government may prove essential if traditional institutional autonomy will continue to prevail.

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